Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Kevin John Cain,

Petitioner,

v.

Anne Marie Cole, Cain

Respondent.

On Petition For A Writ of Certiorari To The Second Circuit Court Of Appeals of Louisiana

PETITION FOR A WRIT OF CERTIORARI

KEVIN JOHN CAIN
In Proper Person
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QUESTIONS PRESENTED

State exceeded its constitutional and statutory authority granted under the Fourteenth Article of the Amendments to the Federal Constitution and violated petitioner's:

1. substantive due process rights when it modified a 1997 award of joint custody pursuant to a court order on October 5, 2004.
2. substantive due process rights in a civil litigation in which due process required a burden of proof of preponderating evidence regarding parental fitness.
3. substantive and procedural due process rights when it suspended the fathers visitation rights and duties despite petitioners full compliance with the order.

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JURISDICTION

This appeal comes to the US Supreme Court on appeal by right of challenge that the Louisiana State Court upheld the validity of La CC Statute Article 131 and Article 132 pursuant to its Judgment rendered May 11, 2005 and in violation of due process of law as guaranteed by Article Fourteen of the US Constitution. This request for application for Writ of Certiorari to the US Supreme Court is sought after denial of a Writ of Certiorari to the Louisiana Supreme Court on June 15, 2005 and after exhausting all state remedies available and is sought requesting relief from irreparable damage to petitioner's procedural and substantive due process rights from an executory state judgment exceeding the powers conferred to the state by Article 14 of the US Constitution. The federal questions were raised and documented both in the appellate brief(s) and in oral arguments thereof before the La. Second Circuit Court of Appeal of Louisiana in April 2005. Jurisdiction over this writ is vested in Title 28 U.S.C. Part IV Chapter 81 sections 1254 and 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 of the U.S. Code

US Constitution AMENDMENT XIV Passed by Congress June 13, 1866. Ratified July 9, 1868.Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In general, State exceeded its constitutional and statutory authority granted under the fourteenth article of the Amendments to the federal Constitution and violated petitioner's substantive due process rights when it modified a 1997 award of joint custody pursuant to a court order on 10/5/2004. *Tumey v. State of Ohio* 273 U.S. 510, 47 S.Ct. 437 U.S., 1927. Mar 07, 1927. The fourteenth article of the Amendments to the Federal Constitution denies the state the right to deprive one of life, liberty, or property, without due process. Due process for the case at issue requires a burden of proof in child custody cases, that pursuant to La CC Art 131... is the best interest of the child. La CC Art 131 and La. C.C. Art. 132 provides in pertinent part: "In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to parents jointly." La. C.C. art. 132 provides in pertinent part: "... if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent." The record shows plaintiff and petitioner executed a 1997 decree of divorce waiving implementation of a joint custody implementation plan. Plaintiff submitted a Joint Custody Implementation Plan to the trial court in January 2003 evidencing a continuing accord with the 1997 agreement. In accordance with Louisiana statutory and case law *Evans v. Lungrin* 708 So.2d 731La.,1997-0541 (La 2/6/98) no longer is joint custody simply presumed to be in

the best interest of the child; it is mandated absent an appropriate parental agreement for another custodial arrangement. The revisions also contain changes in the burden of proof in custody determinations. Pursuant to the revised La. C.C. art. 132, a substantially higher burden is now placed on the parent seeking sole custody--that of "clear and convincing evidence."

In general, state exceeded its constitutional and statutory authority granted under the fourteenth article of the Amendments to the Federal Constitution and violated petitioner's due process rights when it suspended the fathers visitation rights and duties despite petitioners full compliance with the order. Further trial court violated procedural substantive due process rights of petitioner when it appointed a post trial evaluator, Patrick Sewell, M.D., in the final Judgment dated October 5, 2004 after it received notice of Patrick Sewell MD's refusal to consent to act in a pre Judgment hearing conducted on October 1, 2004.

The trial court modified the 1997 joint custody arrangement that had been in existence for the past 7 years and granting ex-wife sole custody of the children because the record failed to support and prove a material change in circumstances affecting the welfare and best interest of the children since the entry of the original custody decree in accordance with La C.C. Article 131, La C.C. Article 132 and La C.C. Article 134. (Exhibit I-V Volume I of III, page 88 Amended Interim Order; Exhibit I-V Volume I of III pages 223-228 October 5,2004 Judgment; Exhibit I –V Volume I of III page 14, 1997 Judgment of Joint Legal Custody). (Clerk's Transcripts, Vol..3, page 636, lines 13-21) The Court stated in the reasons for judgment, "The bottom line in this case are should there be sole custody or leave it as joint custody. One thing that has not been what shall I say has not been contested in this lawsuit is that Mr. Cain and Ms May don't communicate and don't talk. I'm going to award sole custody to Ms. May. I think it would be ridiculous to have joint custody. I think she'll make the day to day decisions in the boys lives." The record

demonstrates plaintiff intent and ability to communicate as evidenced by plaintiff's filing of a Rule to Implement Joint Custody Implementation Plan in January 2003 and that a reasonable factual basis does not exist for the trial court finding to modify the 1997 decree. The record failed to support a finding that the parents do not communicate. The record clearly shows both parents have exhibited agreement on the major issues of raising the children such as education, religious training, and medical treatment, *Bagents v. Bagents*, 419 So.2d 460 (La.1982), *Mart v Hill* 505 so2d 1120 (la 1987). Father testified, "when the boys –we have responsibilities. We have two children. We have to talk about health, food, cafeteria, I mean, just any and everything that you have in the normal rearing of children. I don't have any problem with communicating with the responsibilities of rearing a child." (Clerks Transcripts, Vol.. III, page 560, lines 23-30)..."We'd minimize it, but I don't know that we'd have any problem, no. (Clerk's Transcripts, Vol..III, page 561, lines 2,3).....but I would talk with Jeff, Charlene and Anne Marie as needed." (Clerk's Transcripts, Vol..3, page 561, line 29,30). *Bourque v Bourque*, 870 So.2d 1088, 03 -1254, (La. App. 5 Cir. 3/30/04); *Ketchum v Ketchum*, 882 So.2d 631, 39,082, (La.App.2 Cir 9/1/04); *Haik v Haik*, 648 So.2d 1015, 94-563 (La..App. 5 Cir.12/14/94).

Attorney Kammer to the court page 560 line 31 – 32 "but in the past have y'all been able to communicate with each other from 1999 forward up until the time this lawsuit was filed?

Petitioner to the Court Page 561 line 7 – 8 "we'd minimize it, but I don't know that we have any problem, no"

The Court Page 561 line 5 – 6 "You don't think y'all have a problem?"

Petitioner to the Court Page 561 line 7 – 8 "Well I think we do, your honor, I mean, we just minimize; Page 561 line 29 - 30 "I would talk with Jeff, Charlene and Anne Marie as needed; Page 561 lines 14 and 15 What communication do we have? We talk about the boys.

The appeal court overlooked the fact that there was not a reasonable basis for the trial court finding of a "lack of communication" and that the record did not support such a finding. The trial court judge abused his discretion in changing the 7 year joint to sole custody on but one factor included in the realm of factors in La. CC Art 134. There are numerous factors which the trial court must consider in making its determination. The father argues the trial courts reason for modifying the 1997 Joint Custody order due to its findings as stated "ya'll don't communicate" was insufficient because it is but one factor stated in La CC Art 134 and thus insufficient to modify the 1997 joint custody decree and as such is a clear abuse of discretion. Trial judges are not permitted to overlook the factors legislatively enacted to guide their deliberations or point to one factor over all others which may favor a contrary custody placement. *Bynog v Bynog*, 95-173 (La App. 3d Cir 7/26/95), 663 So.2d86.

Mother's allegation that the father is unfit is not supported by the record. Plaintiff never raised this as issue when we divorced in 1997 and agreed to joint custody. Father strongly denies any animosity or ill will between himself and Mother or her parents. The record shows the court heard 5 of 10 witnesses tendered by father that the father is a good father and that the father has not exhibited any ill will towards the mother. The father argues in awarding or modifying a custody arrangement, the best interest of the children is not only the paramount consideration, but is, in effect, the sole criterion. *Favaloro v Cooper*, 562 So2d 943, La.App.5 Cir., 1990. The best interest of the child remains the paramount concern in making custody determinations, and must be balanced with a parent's right to equally share the physical custody of the child where feasible. *Shambley v Holmes*, 821 So.2d 21, 02-116 (La. App. 5 Cir. 5/15/02); *DeGeorge v Gilley*, 701 So.2d 1079, No. 97-CA-387 (La. App. 5 Cir.10/28/97). Father argues that the trial court has a duty to consider the factors contained in the Louisiana Civil Code. La. C.C. Art. 134. La. C.C. Art. 134 states that the list of factors

in that article is a guide for the trial court, and there is no authority for reversing a trial court's failure to consider all the listed factors. In this case the trial court pointed to one sole factor (i.e. "ya'll don't communicate") of finding and the resulting modification constitutes abuse of discretion. Father points out that even the court appointed evaluators stated in their report, "Both Ms. Anne-Marie Cole and Mr. Kevin John Cain are interested in actively parenting the children. Both parents provide each child with emotional nurturance, values, educational performance, and extracurricular activities." (Exhibit P-1, pg. 5) Mother offered no proof of her allegations of harassment by the Father or that the Father was unfit or a harm to the children. Father strongly denies any animosity or ill will between him and the Mother or the Mothers' parents. The court heard testimony from 5 of 10 witnesses tendered by Father that he is a good Father and that he has not exhibited any ill will towards the Mother. (Clerk's Transcripts, Vol.. III, page 542-580, lines 1-32 each page, Vol.. III, pages 596-601, lines 1-32 each page) The record shows both parents have exhibited agreement on the major issues of raising the children such as education, religious training, and medical treatment. Such an award of sole custody to the Mother is inconsistent with the findings and is not in the best interest of the children in accordance with La.CC Art 131; La.CC Art 132; La.CC Art 134. The record showed that on Father's return from military duty, he was active in the daily lives of raising the children (actively coaching the children in organized sports, attending church services, following school progress, etc.). There was no support in the record that the time spent by the children with Father at ball games and other visitation was not in their best interest. The correct standard to be applied by the trial court is the best interest of the children. *Bynog v Bynog*, 95-173 (La App. 3d Cir 7/26/95), 663 So.2d86. *Matherne v Matherne,* 562 So.2d 937, No.90-CA-2, (La.App.5 Cir.1990). LA. R.S 9:335 provides that a written implementation order should set forth the sharing arrangement for physical custody and designate the domiciliary parent. To

the extent feasible and in the best interest of the children, *physical custody of the children should be shared equally. La* C.C. art 132 states, "...in the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however if custody in one parent is shown by clear and convincing evidence to serve the best interest of the children, the court shall award custody to that parent."

The record failed to show that the Mother proved by clear and convincing evidence that an award of sole custody to her is in the best interest of the children and the Trial court abused its discretion in changing joint custody to sole custody despite evidence of agreement on fundamental matters such as the children's health, education, and religious matters. (Exhibit P-1, page 5) *Hicks v Hicks*, 594 So. 2d 532, No. 91-CA-232, (La. App.5 Cir. 1/31/92). Father testified that he accommodated changes to the children's existing routine schedules to remain flexible as circumstances arise. (Clerk's Transcripts, Vol.. III, page 556, lines 17- 26) *Hicks v Hicks*, 594 So. 2d 532, No. 91-CA-232, (La. App.5 Cir. 1/31/92). *Stanley v. State of Illinois*, 405 U S 645 92 S Ct 1208. *Quilloin v. Walcott*, 434 U S 246, 98 S Ct 549 . *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct.1388

In general, state exceeded its constitutional and statutory authority granted under the fourteenth article of the Amendments to the Federal Constitution and therein violated petitioner's due process rights *Tumey v. State of Ohio* 273 U.S. 510, 47 S.Ct. 437 U.S., 1927. Mar 07, 1927, which denies to the state the right to deprive one of life, liberty, or property, without due process in a civil litigation. Due process for the case at issue requires a burden of proof of preponderating evidence regarding parental fitness and as applied to the specific facts and circumstances of the cases the trial court committed legal error in rendering judgment on 9/20/04 by not weighing and evaluating and unjustifiably disregarding the facts and evidence presented by the three medical experts (Alberto Goldwaser, M.D., Exhibit D-5;

Gerald Baker, PhD, Exhibit D-6; Mark Vigen, PhD, Exhibit D-4) that indeed clearly and validly substantiated the father's fitness as a parent. The aforementioned substantiation clearly outweighs any conflicting testimony provided by one Richard Williams, M.D. (Clerk's Transcripts Vol.. III, page 382, lines 2-5) Psychological testing by Mark Vigen, Ph.D. validly substantiated a personality/behavior profile "within normal limits" and "this is a valid profile" (Exhibit D-4 page 1 MMPI-2 Report graded by Rainwater MD) Psychological testing by Gerald Baker PhD validly substantiated a clinical profile "within normal limits." (Exhibit D-6, pg. 58, lines 10-15). Dr. Goldwaser testified (Exhibit D-5, 3/4/04, pg.32, lines 1-6), "My opinion was that he did not suffer from a mental disorder that caused any risk to his children being with him during unsupervised visitations or baseball practices. My second opinion related to that, to that specific question, was that he was fit to be a parent to his sons." (Exhibit D-5, pg.32, lines 1-6) Dr. Goldwaser further stated in his Psychiatric Legal Examination Report, "Mr. Cain's hospital discharge diagnosis in March, 1995, was erroneous. Given the vantage point of an 8 year longitudinal follow up, Mr. Cain never displayed any symptoms or signs of Bipolar Disorder. Mr. Cain did not receive any psychiatric treatment (psychotherapy or medication) for this entire period of 8 years... Noteworthy, Mr. Cain was not even adequately treated for Bipolar disorder while in the in-patient psychiatric unit, yet his condition cleared nicely, Bipolar does not 'clear up nicely'. In 1995 Dr. Stevens never made the diagnosis of Personality disorder NOS with narcissistic and paranoid features. Inaccurately (as retrospectively proven) Dr. Stevens was of the clinical opinion that Mr. Cain needed "continued out-patient therapy and follow-up after discharge from the hospital." (Exhibit D5, page 13)

The trial court is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. A trial court may accept or reject in whole or in part the opinion expressed by an expert. Further, a trial judge may

substitute his/her common sense and Judgment for that of an expert witness when such a substitution appears warranted on the record as a whole. *Galloway v Gaspard*, 340 So.2d 579,583, No.10934, (La.App.1 Cir. 1976). The Father emphasizes that Dr. Stevens noted on the Charter Forest record that "....patient had an excellent response to medication management..." (Exhibit P-4, pg.26) despite the fact that no medication was ever taken (swallowed/ingested) by petitioner and petitioner testified "even when I was in Charter Forest I never took any of that." (Exhibit P-17, page 37 Lines 18,19). The record shows Gerald Baker, Ph.D. administered a MMPI-2 Test to the Father and testified "I have the MMPI results, which interestingly, is pretty much that same thing that Mark Vigen, Ph.D. arrived at in his MMPI evaluation, which doesn't indicate any psychopathology. It doesn't indicate anything that says that he is not suitable for – for parenting." (Exhibit D-6, page 58 lines 10-15) The record shows two independently administered MMPI-2 tests (one test administered to the Father by Mark Vigen PhD and another test administered to the Father by Gerald Baker PhD) corroborate the same result of "no psychopathology" and a personality profile "within normal limits." The record shows Dr. Vigen's MMPI-2 Evaluation Report profile substantiates that Mr. Cain's personality behavior profile is "within normal limits" and "this is a valid profile" (Exhibit D-4 page 1 MMPI-2 Report graded by Rainwater MD.) The record shows that Dr. Goldwaser testified that, "Even during the hospital stay he was not adequately treated for the disorder that they – that Dr. Stevens diagnosed. And yet, the condition clearly 'cleared nicely'. And again, this is not a situation that we see in Bipolar Disorder." (ExhibitD-5, telephone deposition, Goldwaser, 3/4/04, pg.33, lines 21-25) The idea that this person went to the hospital and two weeks later was totally free of symptoms, cleared nicely, to the point of being discharged back to the community, back to what he was doing with his children, and all that literally with literally no appropriate treatment, no

adequate treatment for that, and cleared nicely for the rest of the time for eight years. Right now, that would be about 9 years that he is still in this—that the particular condition is still cleared nicely. This we don't see in Bipolar Disorder. Bipolar is a chronic process that without treatment renders the person ....more and more and more less functional and more impaired....And here we have a person that for 8, by now would be nine years, ...without any signs and symptoms of this disorder. ...This illness that they diagnosed for which they did not treat either." (Telephone deposition of Goldwaser, Exhibit D-5, 3/4/04, pgs. 34 lines 13-25, pg. 35, line 1-8). Father emphasizes that the record shows that the 1995 Charter Forest record, Part IV Psychosocial History, reported that the plaintiff said that: " he loves the boys very much, ...is very good to the boys." (Exhibit P-4, pg. 93). On March 4, 2004 Dr. Goldwaser testified, "There was no question of parental adequacy ever raised (as of March 4, 2004) by his ex-wife or the court" (Exhibit D-5, pg. 40, lines 8-10) ....They all agree, Dr. Vigen as well as the other doctors, they all agreed that the children were basically intact, well adapted, functioning well in school and at home and showing no signs or symptoms of trauma of any type. None of the children reported any significant problems during the 3 ½ years of uninterrupted time-sharing with their Father." (Exhibit D-5, pg. 40, lines 13-18).... "I pointed out that my reading of the reports, final report is a 6 page report that Dr. Williams and the other two doctors filed, they were not able to produce any evidence of significant risk to the welfare of the sons other than loosely expressing some level of intimidation. The doctors did not provide any clinical data, any information to associate the psychiatric diagnosis they reported Mr. Cain had, yet they pronely recommended psychiatric treatment and compliance with medication....I could not find any clinical evidence during my examination of Mr. Cain and also during my examination of reading Dr. Williams' report of serious psychiatric problems and in need of psychiatric medication.....I disagree with that report." (Exhibit D-5, page

41, lines 8-25 and page 42, lines 1-5) "The doctors did not offer any opinion as to their understanding of the fact that at least for the last 8 years Mr. Cain took no psychiatric medication and was not under any type of psychiatric treatment, and no disturbing event was ever described between his children and him." (Exhibit D-5, Goldwaser Psychiatric Legal Examination Report, pg. 14.) Additionally, the record failed to show that the trial court considered the weight of credentials of the court appointed expert Dr. Richard Williams against the credentials of the expert Dr. Alberto Goldwaser in relying on an expert opinion in determining Mr. Cain's parental fitness. Dr. Alberto Goldwaser is a medical doctor with a specialty in psychiatry, with additional subspecialty designations in forensic psychiatry. He is board certified by the: 1. American Board of Psychiatry and Neurology (ABPN). Certification number 22820; 2. American Board of Forensic Examiners Certification number 1200; 3. American Board of Forensic Medicine. Certification number 452; 4. American Board of Psychiatry and Neurology (ABPN), Subspecialty Certification in forensic psychiatry. Certification number 991; 5. American College of Forensic Examiners Certification number 5029. In addition, Dr. Goldwaser is published in his field of expertise. (Exhibit D-5, Curriculum Vitae of Goldwaser) The fact finder's great discretion extends to its assessment of expert testimony. *Sistler v Liberty Mutual Ins. Co.*, 558 So.2d 1106, No. 89-C-1736, (La. 3/12/90). The weight to be given expert testimony depends, ultimately, on the facts on which it is based, as well as the professional qualifications and experience of the expert. *Meany v Meany*, 639 So.2d 229, No. 94-C-0251, (La.7/5/94); *Thomas v Petroland Gas Service, Ltd. Partnership*, 588 So. 2d 711, No. 22774-CA, (La. App. 2 Cir. 9/27/91) writ denied, 590 So.2d 1201 (La.1992). For an expert opinion to be valid and merit much weight the facts upon which it is based must be substantiated by the record; if the facts are not substantiated by the record, the trial court may reject the opinion. The record shows the Father filed a

complaint against Dr. Richard Williams with the Louisiana State Board of Medical Examiners for issuing a report that materially misrepresented statements made during an interview with Dr. Williams. (Exhibit P-6, pg 2) Father testified he that he told Dr. Williams of the 1995 Charter Forest record and the 2 DWI's approximately 20 years ago. (Exhibit P-17, pgs. 26-29). The record also shows that the Richard Williams, M.D. report dated June 16, 2003, relied on another doctor's (Lee Stevens, M.D.) 1995 diagnosis. (Exhibit P-1, pg. 4) Subsequently a correction of this 1995 diagnosis was made during pre trial discovery by Dr. Goldwaser. Subsequent to the aforementioned correction and in his testimony at trial, Richard Williams, M.D., in effect, changed his statement in his previously issued report in an attempt to directly diagnose the Father with a bipolar illness. Richard Williams, M.D. made this diagnosis of the Father indirectly using the Father's replies to questions asked by another M.D. (Dr Goldwaser) that in fact proved that the Father indeed did not have the bipolar illness. (Clerk's Transcript, Vol.. II, Page 3 Lines 30-32; and Pages 318-382 Lines 1-32 on each page) This questionable testimony by Richard Williams, M.D. during trial was never considered by the court in assessing the reliability of this witness. Furthermore Dr Williams testified to facts unsupported in the record, when he testified "and then when he (Kevin Cain) decides to come back in to town and file for separation" (volume ii of iii p374 line 22 – 24). The record clearly shows that Kevin and Anne Marie were married when he joined the Army in 1995, the divorce was in August 1997 and the return from active duty in North Carolina was in October 1999. The record shows Dr. Williams is attempting to take normal MMPI test results and turn it into a psychotic disorder and opine the same. The father offers proof that the Louisiana Second Circuit Appeal Court erred in the review of the case record as noted below:

1. On the issue of the mothers allegations that petitioner withheld critical information from Dr Baker, casting doubt on his opinions and warranting the courts refusal to

credit the Dr Baker testimony. The record clearly shows Dr Bakers deposition and testimony under oath under both counsel's examination conducted on September 1, 2004 clearly substantiates that Dr Baker's opinion was based on full disclosure and communication of facts and allegations in the record (i.e. Petitioner disclosed: 1) the Charter Forest medical record and 2) the allegations in the Rule to Implement Joint Custody Implementation Plan and for Injunctive Relief submitted by plaintiff and 3) the Dr Williams Court Appointed Evaluator Report).

Regarding the allegations in the Rule to Implement a Joint Custody Implementation Plan and for Injunctive Relief submitted by plaintiff

Gary Albert Bowers to the Court (page 7 line 18 – 21) "Did you talk with him to get some background about what the circumstances were that precipitated the litigation?"

Dr Baker stated that he knew of the allegations in the petition Rule to Implement Joint Custody Implementation Plan and for Injunctive Relief submitted by plaintiff (page 7 lines 22 thru 25 and page 8 line 1),

Dr Baker testified, "Right. His concerns there that his – the mother of his children was accusing him of having had emotional difficulties. There were some threats, but for the most part, he felt like any allegations that were made against him were – being unfair."

Regarding the Charter Forest & the Court Appointed Evaluator Report (Dr Baker Deposition Exhibit D6):

Dr Baker stated that Kevin told him the history about the Charter Forest hospitalization and the Court Appointed Evaluator report "page 7 line 11 thru 15 Dr Baker testified "he had had visitation with this children you know. The – and subsequently did read the report, which had to do with his previous hospitalization." The father further argues that even if one were to consider a court hypothetical that the Baker deposition was thrown out there still remains the bare Baker MMPI test data that corroborates the Vigen MMPI test data

which substantiates a valid and normal psychological profile. The father simply argued that the Baker opinion based on scientific MMPI testing that corroborated Dr. Vigen's MMPI test data and that the trial court should have given more weight to this fact. The evidence preponderated a finding of the father's fitness as a parent and at very least that by virtue of this he was not unfit. A review of the Trial Court record will show that the Trial Court did not refuse to credit the testimony of Dr Baker as the Appeal Court stated in its opinion.

2. On the issue of the mothers allegations that Kevin withheld critical information from Dr Goldwaser, casting doubt on his opinions and warranting the courts refusal to credit the Dr Goldwaser testimony.

Dr Goldwaser's deposition and testimony under oath under both council's examination clearly substantiates that Dr Goldwaser's opinion was based on the full disclosure and communication of the facts and plaintiff allegations in the record (i.e. Petitioner disclosed 1) the Charter Forest medical record and 2) the allegations in the Rule to Implement Joint Custody Implementation Plan and for Injunctive Relief submitted by plaintiff and 3) the Dr Williams Court Appointed Evaluator Report).

Regarding the plaintiff allegations in the Rule to Implement Joint Custody Implementation Plan and for Injunctive Relief submitted by plaintiff and the Dr Williams Court Appointed Evaluator Report submitted to Judge Waddell (Dr. Goldwaser Deposition Exhibit D5).

Dr Goldwaser testified page 15 lines 2 - 7 "And in fact the reason for this evaluation originally was not related for the reason for the change of the custody arrangement had nothing to do with his being an unfit parent but had to do with the mother want to spend weekend time with the children."

Dr. Goldwaser testified page 78 lines 12 – 14 "what I do recall his telling me is that they were not amicable, but not to the extent you were presenting."

Dr Goldwaser testified page 79 lines 10 -18, "January is the first time that she is presenting these allegations that happened many times in the past, obviously this appears to me as not being so threatening since she did not report them before to anyone and he was having the children February 2003." At the close of the discovery deposition:

Jim Fortson to the court page 106 line 17 "Do you stand by your opinion in that regard?"

Dr. Goldwaser testified page 106 line 17 – 21 "I stand by that, (opinion), but with one reservation. The reservation being that allegation of threatening to kill the mother if she did not cooperate and so on." Attorney Jim Fortson to the court page 106 line 22 – 25 , "But if that turns out to be denied by him, then would you stand by your decision?"

Dr Goldwaser to the court page 106 line 24 -25. "If that – I mean if that is not the case, yes I do."

Regarding the complaint to the State Board of Medical Examiners regarding Lee Steven MD (Dr. Goldwaser Deposition Exhibit D5).

1. Dr. Goldwaser testified that he knew of the letter to the State Board of Medical Examiners regarding Dr. Lee Stevens.

Dr Goldwaser testified "Yes he did tell me" page 70 line 19.

The Louisiana Second Circuit Court of Appeal erred in their review case record as stated on page 7 of their opinion under the heading "Action of District Court" when they incorrectly stated "The court found that the boys were scared of the father" The Trial Court stated in the reasons for judgment page 46 Line 22-24 "....I do not think the boys are scared of the father." "I do not think the boys are in harms way at all." Page 50 lines 12 -13. The trial court stated in the reasons for judgment page 50 lines 25-26 "..They never feel threatened by either of ya'll" Page 50 line 25-26 "I don't believe you would harm them" Page 50 lines 20 -21. "I do not think he is a threat to the sons" page 47 lines 26 and 27. "I think the boys want to see you" Page 48 lines 31 -32.

The father argues *Gould v Gould* 687 So.2d 685, 28,996 (La. App. 2 Cir. 1/24/97); *Meany v. Meany*, 639 So.2d 229, No.94-C-0251 (La.7/5/94),; *Rogers v Roch* , 663 So.2d 811, 95-242 (La.App.5 Cir. 10/18/95) , writ denied, 95-2769 (La. 1/26/96) La. C.E. art 702, Testimony by Experts states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise Acts 1988. No. 515 Paragraph, effective Jan 1, 1989. The Record shows:

1) Petitioner did not take any medication while in charter forest and plaintiff has failed to refute this and no blood tests or urine drug screens were reported in the Charter Forest medical record to substantiate her allegations of drugs in 1995.

2) An erroneous 1995 diagnosis with over 8 years retrospective proof with no signs symptoms, 2 corroborating valid and normal MMPI psychological personality profile test results, a forensic expert with 2 substantiated opinions, a clinical psychologist with one substantiated opinion. Petitioner has proved with legal and medical certainty that he did not nor currently does have bipolar or a personality disorder or any other problem.

3) No evidence in the medical record of clinical depressive or manic episodes in petitioner's lifetime,

4) No history of Psychosis/illness. No history of suicidal attempts. No history of violent behavior to substantiate plaintiff allegations that petitioner is an unfit or suicidal. Petitioner also notes the record shows Dr. Willis Taylor a US Army MD performed a 1995 medical examination and stated in the record evaluation "no psychiatric abnormalities" (appeal record exhibit) 5). Petitioner has testified through out the record that the facts under the 1995 diagnosis are disputed. The 1995 diagnosis was proven to be erroneous by a forensic expert. The forensic

expert with specialty certifications designations credentials offered the court causation and the record shows what most likely transpired in 1995 in lieu of the erroneous Charter Forest/Lee Stevens MD bipolar diagnosis. The Louisiana Supreme Court, in *Haughton v. Fireman's Fund American Ins. Co.*, 355. so.2d 927 (La.1978), stated that causation remains the province of the courts, not to be decided exclusively on the basis of the medical testimony. Such a pronouncement avoids the battle of the experts; that testimony with diametrically opposed viewpoints in an adversarial legal proceeding and environment...the most truthful statement that the medical profession can make regarding causation and the erroneous 1995 diagnosis is evidenced in the testimony of Dr. Goldwaser "the most likely thing that inflicted this person was substance induced mood disorder." The answer to the causation problem can be found in Dr. Goldwaser/Cain interview in which petitioner answered Dr. Goldwaser's to the effect that petitioner had done drugs and later at trial under oath petitioner clarified that petitioner was answering in terms of second hand marijuana smoke inhalation and CDS smoke inhalation from being around other people smoking drugs.(Clerk transcript III of III page 516 lines 1-31 and page 517 line 1-32, and page 518 line 1-20). The father argues *Austin v. Industrial Lumber Company*, La.App., 8 So.2d 727 Circuit Jun 30, 1942; stated "where there is a conflict in expert medical testimony, and there is no apparent way to reconcile it, the court is not bound by the number of opinions on the one side or the other any more than it is bound by the number of lay witnesses who testify to a controverted fact at issue in a case. The father argues it was err of the trial court to order him to see a subsequent evaluator especially after the evidence preponderated a finding that the father was fit. It is the duty of the court to arrive at the actual truth of the question involved, whether the disputed fact is sought to be proved by medical or lay

testimony. The rule as to evaluating expert testimony is concisely summed up in 20 Am.Jur. p. 1056, Section 1206, as follows: "notwithstanding the critical comments upon the value and credibility of expert opinion testimony to be found in many opinions, it is generally recognized that the relative weight and sufficiency of expert and opinion testimony is peculiarly within the province of the jury to decide, considering the ability and character of the witness, his actions upon the witness stand, the weight and process of the reasoning by which he has supported his opinion his possible bias in favor of the side for whom he testifies, the fact that he is a paid witness, the relative opportunities for study or observation of the matters about which he testifies, and any other matters which serve to illuminate his statements, in other words, the same tests which are commonly applied in the evaluation of ordinary evidence are to be used in judging the weight and sufficiency of expert testimony." Petitioner argues that the decision by the trial court was simply that it was presented with two conflicting views of the evidence from which to make a credibility call. When one strips away the subjective testimonies of all of the witnesses on both sides of this issue, one is still left with uncontroverted and corroborated objective MMPI test evidence, demonstrating normal psychiatric profile of petitioner which the law requires the courts to accept as true. *La. Power & Light Co. v. Roberts,* 408 So.2d 49 (La.App. 3 Cir.1981), writ denied, 412 So.2d 1111 (La.1982).Court of Appeal of Louisiana, Third Circuit. *Ginger Kuhl, v. Richard S. Kuhl, Jr.* Petitioner argues that the failure of the court to choose (make a choice) between the two opposing expert opinions violated constitutional rights of due process and equal protection clauses (Louisiana Constitution Article I, Section 2 and Article I, Section 22 respectively) which substantially affected and prejudiced his substantive rights in favor of the plaintiff. The father points out the Appeal Court erred in their review when it

stated that the Trial Court in effect threw out the testimony of the petitioner's expert. The record shows the Trial Court stated "in view of the conflicting data" which at very least leads one to infer that the court considered both expert's opposing view and their contentions.

Where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent de novo review of the record and determine a preponderance of the evidence. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La.2/20/95); 650 So.2d 742, 747, rev'd in part, on other grounds, 96-3028 (La.7/1/97); 696 So.2d 569, reh'g denied, 96-3028 (La.9/19/97); 698 So.2d 1388. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. See *Lasha v. Olin Corp.*, 625 So.2d 1002, 1006 (La.1993). Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. See *Lasha*, 625 So.2d at 1006. When such a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts de novo. *Lasha*, 625 So.2d at 1006. *Evans v. Lungrin*, 97-0541 (La.2/6/98), 708 So.2d 731 *Herla Jill Hoskins, v John Damon Hoskins*, 814 So.2d 773, 36,031 (La.App. 2 Cir. 4/5/02).

The Appeal Court erred in their review of the case record as stated on page 13 of its opinion in finding the Trial court found the petitioner testimony less credible due to the impeachment value of the medical records. The record clearly shows the fact that petitioner testified under oath to making the statements noted in the Charter Forest medical records and that such testimony under oath included clarification for the truth of the matter regarding the statements. The appeal court failed to consider the fact that the Charter Forest medical records contained no blood-work or urine analysis screening

test to evidence any drug use and substantiate a finding of impeachment. The appeal court also failed to consider the fact that the Charter Forest medical records contained no evidence of suicide attempts or no evidence of episodes of psychotic/depressive illness to substantiate a finding of impeachment.

On the issue of the drugs

Trial Transcript Vol. III of III page 520 Lines 15 - 29

Mr. Bowers to the court. "do you deny that you checked into Charter Forest Hospital that you told Dr. Lee Stevens, Dr. Tom Staats and the substance abuse counselor Ms. Janet peters, among other people at Charter Forest that you were smoking marijuana, that you were smoking crystal methamphetamine and using some kind of other drug known as mini thins.

Kevin to the Court. "I told them that"

Mr. Bowers to the court "you told them that?

Kevin to the Court "That's what they wanted to hear. I kept telling them no to begin with, and that wasn't good enough, so they just kept at me, so I finally told them what they wanted to hear"

On the issue of the suicide statement

Trial Transcript Vol.. III of III page 523 Lines 17 – 32

Kevin to the court "Because there was a problem with that suicide statement and I'm going to best liken it to a description here. The question they asked me "have you ever thought of suicide" Yes

Kevin to the court " there's two statements here that I'm going to compare. Have you ever thought of suicide and have you ever thought of committing suicide. They asked me the first. Yes, I have thought of suicide. They did not ask me the second, have I ever thought of committing suicide. The answer would have been no unequivocally.

Trial Transcript Vol.. III of III page 524 Lines 1 – 9

Kevin to the court, "That was where the miscommunication....happened right there, and those folks did not want to hear any thing other than that."

The Appeal Court erred in their review of the facts of the case record as stated on page 12 of its opinion under the section expert testimony when they stated "Kevin withheld many facts from Dr. Goldwaser....Kevin admitted using marijuana prior to his Charter Forest admission hence the diagnosis substance induced mood disorder yet at trial Kevin denied ever discussing CDS with him. The Trial Court record does not support the appeal court determination as shown in the transcripts:

Trial Transcript Vol.. III of III page 516 Line 4 - 6 Kevin to the court: "I've smoked – I've been in other rooms with other people who have smoked it, come in contact with second-hand smoke.

Trial Transcript Vol.. III of III page 516 Line 7- 8 Bowers to the court: "I'm not asking you about other people smoking or second-hand smoke.

Trial Transcript Vol.. III of III page 516 Line 9 Kevin to the court: "Well that's the only thing that applicable" Trial Transcript Vol.. III of III page 516 Line 10 -11 Bowers to the court "Let me finish the question. I asked you have you ever smoke marijuana". Trial Transcript Vol. III of III page 516 Line 12: Kevin to the court "second hand"

Trial Transcript Vol. III of III page 516 Line 12 Bowers to the court, "Have you ever taken crystal methamphetamine?

Trial Transcript Vol. III of III page 516 Line 14 -15 Kevin to the court, "Second hand smoke also"

Trial Transcript Vol. III of III page 516 Line 16-18 So when you told Dr. Goldwasser that you had used crystal methamphetamine, you lied to Dr. Goldwasser about that?"

Trial Transcript Vol. III of III page 516 Line 19-22 "No I was talking to him in that time frame right there or that respect right there I've come in contact, I've been around other people. I've been in cars. I've been in houses.

Trial Transcript Vol. III of III Page 517 line 29-30 The Court "if you are going to impeach him lets go. He's denied it"

Trial Transcript Vol. III of III Page 517 line 31- 32 Bowers to the court "I can't prove something that isn't in the transcript" The case transcripts partially stated above clearly show that the Louisiana 2nd Circuit Court of Appeal clearly breeched the duty and standard of care owed in reviewing the Cain v Cain CA 39903 record on appeal and that the resulting miscarriage of justice can be remedied by a review of this case by the US Supreme Court and the powers conferred to it therein by the US Constitution. In General State exceeded its constitutional and statutory authority granted under the fourteenth article of the Amendments to the Federal Constitution and violated petitioner's due process rights when it suspended the fathers visitation rights and duties despite petitioners full compliance with the order. Further trial court violated procedural due process rights of petitioner when it appointed a post trial evaluator, Patrick Sewell, M.D., in the final Judgment dated October 5, 2004 after it received notice of Patrick Sewell MD's refusal to consent to act in a pre Judgment hearing conducted on October 1, 2004. (Exhibit I-V, Volume III of III, page 671 Lines 19- 24). The order was clearly arbitrary and there was no reasonable means to comply with such an order as evidenced by hearing transcript Exhibit A page 12.

Lines 19 -21 The Court, "His visitation are suspended until after he has an appointment with Dr. Sewell or Dr. Sewell's replacement. Period.

Mr Kammer (Attorney for petitioner), "Who is his replacement?"

The Court, "I don't know" Father also emphasizes that the Mother's counsel and Trial Court agreed to Dr. Sewell in the October 5, 2004 Judgment even after receiving notice of a refusal to consent to act by Dr. Sewell at the October 1,2004 hearing. La C.E. art. 706 states the following on court appointed experts:

A) Civil cases. In a civil case, the court may on its own motion or on the motion of any party enter an order to show

cause why expert witnesses should not be appointed, and may request-- the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. Acts 1988, No. 515, §1, eff. Jan. 1, 1989. Pursuant to the court order of September 20, 2004 the Father called Dr. Sewell's office on September 22 (within 48 hours) to make an appointment and was notified that Dr. Sewell was on vacation, would not return until late October 2004, and that Dr. Sewell does not perform services in connection with litigation. The Court and the Mothers' counsel were informed (i.e. proper cause shown why) that Dr. Sewell did not perform services in connection with litigation matters in the October 1, 2004 hearing. (Exhibit I-V, Volume III of III, page 671Lines 19 - 24, October 1, 2004, Hearing Transcripts) (See lines 18 -20 on page 19 of the appendix).

Suspension of petitioner's parental rights and duties on 10/1/04 violated his constitutional rights of due process and equal protection. The court ordered suspension of the fathers parental rights and duties after the petitioner had shown proper cause for not appointing an expert (in the first instance because enough evidence was adduced at trial to preponderate parental fitness and in the second instance because an expert refusal to consent to act) prejudiced the fathers rights and violated his equal protection and due process constitutional guarantees under La Constitution of 1974 Article I Section 2 and Article I Section 22 respectively and clearly frustrated his parental rights and duties and was legal error committed by the trial court. *Chambers v. LeBlanc*, 598 So.2d 337 (La. 1992); *Winston v. Martin*, 34,195 (La. App. 2 Cir. 7/6/00),

764 So. 2d 368; *Smith v. Louisiana Dept. of Public Safety*, 90-1029 (La. App. 3 Cir. 10/15/90), 571 So.2d 666; *Hamilton Medical Group v. Ochsner Health Plan*, 550 So.2d 290 (La. App 3 Cir. 1989)

The Appeal Court erred in their review case record on the issue of subsequent court appointed evaluator appointed in the final judgment. The appeal court stated "the court then named Dr. Cliff Dopson in his stead (i.e. in lieu of Sewell MD)" however the transcripts clearly showed that Dr. Dopson was ruled out and was indeed not named as a replacement. A review of the Trial court reasons for judgment shows Judge Waddell stated "If something happens and Mr Pat Sewell will not do it, then the next suggestion I would use would be Dr. Cliff Dopson but I'm ordering Dr Pat Sewell first Page 646 line 1-4 Trial Transcripts. The court ruled out Dr. Dopson as noted on the trial transcripts on page 648 reason for judgment line 18-28. Attorney Kammer to the Court "I think he said Dr Cliff Dopson used to be her --- or she may have had a relationship with him from a treatment standpoint" Trial transcripts page 648 line 18.

Ms Cole Cain to the Court "he was the psychiatrist in a group" Trial transcript page 648 line 22 - 23

The court "I was just using Dopson so if something happened you wouldn't have to come back and ask me another name. We'll leave it with Pat Sewell. If that's a problem then we will go with someone else." Trial Transcripts page 648 line 24 -28.

The record shows that the court suspended the petitioner/fathers parental rights and duties after a finding by the court that The Petitioner/father was not a threat to his children as stated by Judge Waddell in the reasons for

judgment page 636 Line 22-24 "....I do not think the boys are scared of the father." "I do not think the boys are in harms way at all." The court ordered suspension is contrary to the court findings and is not in the best interest of the children. *Bourque v Bouillion*, 663 So.2d 491 Notwithstanding the defendant's objection to the court appointment of a

subsequent evaluator, the father notes for the record that the plaintiff has absolutely no beneficial interest in the determination of "who" the subsequent qualified evaluator would be due to the fact that the plaintiff has no collateral or beneficial interest and could be nothing more than an incidental beneficiary with no rights to assert in the matter. To hold otherwise by the trial court is a procedural due process violation of petitioners rights protected under the US Constitution.

The trial court committed legal error by not considering the moral character of the Mother insofar as it affects the welfare of the children. Father filed a request for admission of fact propounded unto Mother that she consumed illegal drugs during pregnancy with either or both sons (Interrogatories, Requests for Production and Request for Admissions of Fact Propounded Unto Anne-Marie Cole, served on February 20, 2004, Fact Number 1) Mother's response to request for Admission of Fact Number 1 was: "denied as written". (Exhibit I-V, Volume I of III, page 121, Answers to Interrogatories)

In addition, the Father's discovery witness list provided 2 witnesses who could testify to the fact that she consumed illegal drugs during pregnancy with both children. (Exhibit I-V, Volume I of III, page 206 interrogatories and witness list). The trial court failed to take into consideration the moral character of the mother and make any factual finding in the best interest of the children despite evidence of moral turpitude adduced at trial and fact that the trial judge is not permitted to overlook factors legislatively enacted to guide their deliberations. La C. C. article 134 (6) and *Hoskins v Hoskins 814 So.2d 773*, 36031 (La App 2 Cir 4/5/02)

The trial court committed prejudicial error by limiting the trial to events subsequent to 1997 while considering Mother's allegations that Father is not fit because of a 1995 medical record (Interrogatories, Requests for Production and Request for Admissions of Fact Propounded Unto Anne-Marie Cole, served on February 20, 2004, Interrogatory Number 3).

(Clerk's Transcripts Vol. II, page 22 323, lines 13-16) By prejudicially considering pre-1997 evidence against the Father and not considering pre-1997 evidence against the Mother concerning her moral turpitude in Assignment of Erro' 4 (immediately above) constitutes legal error. To introduce evidence of facts occurring prior to a consent decree, the evidence must be relevant and material. However, even relevant evidence of facts occurring prior to the consent decree should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or considerations of undue delay or waste of time. La. C.E. Art. 401 , La. C.E. Art.403. The fact that a consent decree was executed on August 19, 1997, and the time that has elapsed since its execution, are factors to consider in determining the admissibility of the evidence. To hold otherwise would result in litigation of issues pre-dating the consent decree no matter how far removed in time. The trial court must make this evidentiary determination on a case by case basis and should articulate its reasons why the evidence was admitted or excluded. The Trial Court did not impeach the credibility of father testimony or character as evidenced by the statement "I assume its for impeachment." This statement in the court transcript is prima facie that the court reasoned that it indeed was not proved that the petitioner was impeached. Given the length of time between Mother's allegations (Exhibit I-V, 1 of III page 119 Answers to Interrogatories and Response to Request for Production of Documents filed by Mother, Answer to Interrogatory Number 3) and the original consent decree (August 19, 1997), and other factors such as conduct after the consent decree, Mothers allegations are suspect. Mother waited 7 years from the date of the consent decree before seeking modification. L.S.A-R.S. 9:364, Subd. *A. Raney v Wren*, 722 So.2d 54, No.98-CA-0869, (La.App.1 Cir) 11/6/98). Additionally Mother/Plaintiff was quoted in the 1995 Charter Forest record, Part IV Psychosocial History saying , " he (the Father) loves the boys very much, ... is very good to the boys." (Exhibit P-

4, pg. 93). Trial court erred in not considering the legality of the 1995 Charter Forest Admission ordered by Lee Stevens in assessing the credibility of his character as a witness and his competence as an M.D. to make a valid and correct medical diagnosis.

Pursuant to La. R.S. 28:52.4 "Admission by relative" Subparagraph C, "As soon as practicable, but in no event more than twelve hours after admission to the hospital/or in-patient facility, a physician shall examine the person and either execute an emergency certificate in accordance with La. R.S. 28:53(B) or order the person discharged." An OMH Form 1 entitled State of Louisiana DHH Office of Human Services Physician Emergency Certificate (PEC) was signed and executed on 3-13-1995 at 10:05 a.m. by Lee Stevens M.D. (Exhibit P-4, page 22) A Form 68 Physician's Orders dated 3/12/1995 at 2:00p.m. stated, "Admit to ...per verbal order (vo) of Lee Stevens, M.D., Exhibit P-4, page 38) It is prima facie from these two documents that the admission time of 3/12/1995 at 2:00 p.m. and the PEC execution time of 3/13/1995 at 10:05 a.m. clearly exceeds 12 hours, and that as a result Kevin Cain should have been ordered discharged immediately. In the absence of a validly executed PEC in the absence of a subsequently validly executed CEC and in the absence of an immediate order for discharge, the Charter Forest admission was invalid and illegal. Prima Facie evidence that the admission was by a relative is substantiated by the Charter Forest Form entitled Confidential Psychological Evaluation which stated under "Reason for referral and Pertinent History" "Mr. Kevin Cain is a 31 y/o CPA who was admitted by his wife and Father in law." (Charter Forest Exhibit P-4, page 30) (Interrogatories, Requests for Production and Request for Admissions of Fact Propounded Unto Anne-Marie Cole, served on February 20, 2004, Fact Number 2)

The trial court erred in changing custody to the Mother in that it failed to consider the evidence taken as a whole in determining the best interest of the children pursuant to La

C.C. article 134 La C.C. article 131 and La C.C. article 132. The trial court incorrectly evaluated the situation, stating, "....Mr. Cain, you've been away" (Clerk' Transcripts, Vol. III, page 636, lines 9-12) when the record showed that Father had been active in the children's lives (coaching the boys sports, regularly attending church, attending to school matters) for the immediate past 3 ½ years. La C.C. Article 132 provide a presumption in favor of joint custody; however the presumption is refutable by evidence showing joint custody not to be in the best interest of the child. In that instance, the sole custody is to be granted to one of the parents. *Turner supra; Donaldson v Donaldson,* 459 So.2d 616, No. 84- CA-77, (La. App. 5 Cir.1984); *Sharp v Sharp*, 470 So.2d 371, No. 85-CA-34 (La. App. 5 Cir. 1985). In order to rebut the presumption, La C.C. art 134 lists the factors to be considered as well as consideration to be given to any other factor the trial court finds relevant. The burden of proof that joint custody is not in the best interest of the children is upon the Mother. Father argues that Mother failed to prove a change that joint custody is not in the interest of the children. The Father offered evidence that a change to sole custody to Mother was not in the best interest of the children. Pursuant to La C.C. Articles 132 ... "if the parents agree who is to have custody, the court shall award custody in accordance with their agreement unless the best interest of the child requires a different award. In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent" and La CC article 131, "In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child. " The evidence supported that the joint custody arrangement would be in best interest of children as listed in La CC article 134 and as noted below:

(1) The love, affection, and other emotional ties between each party and the child. The court appointed evaluators stated, "Both Ms. Anne-Marie Cole and Mr. Kevin John Cain are interested in actively parenting the children. Both parents provide each child with emotional nurturance, values, educational performance, and extracurricular activities." (Exhibit P-1, pg. 5)

(2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child. The court appointed evaluators stated, "Both Ms. Anne-Marie Cole and Mr. Kevin John Cain are interested in actively parenting the children. Both parents provide each child with emotional nurturance, values, educational performance, and extracurricular activities." (Exhibit P-1, pg. 5)

(3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs. The court appointed evaluators stated, "Both Ms. Anne-Marie Cole and Mr. Kevin John Cain are interested in actively parenting the children. Both parents provide each child with emotional nurturance, values, educational performance, and extracurricular activities." (Exhibit P-1, pg.

(4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment and (5) The permanence, as a family unit, of the existing or proposed custodial home or homes and (12) The responsibility for the care and rearing of the child previously exercised by each party. Dr. Goldwaser stated in his report to the court, "none of the children reported any significant problems during the 3 ½ years of uninterrupted time-sharing with their Father." (Exhibit D-5, pg. 40, Lines 13-20)

(7) The mental and physical health of each party. Dr. Goldwaser testified, "My opinion was that he did not suffer from a mental disorder that caused any risk to his children being with him during unsupervised visitations or baseball practices. My second opinion related to that, to that specific

question, was that he was fit to be a parent to his sons." (Exhibit D-5, pg.32, lines 1-6). The psychological testing by Mark Vigen PhD substantiated the Fathers personality/behavior profile "within normal limits" and "this is a valid profile"(Exhibit D-4 page 1 MMPI-2 Report graded by Rainwater MD). Gerald Baker PhD testified, "I have the MMPI results, which interestingly, is pretty much that same thing that Dr. Vigen arrived at in his MMPI evaluation, which doesn't indicate any psychopathology. It doesn't indicate anything that says that he is not suitable for – for parenting." (Exhibit D-6, pg.58, lines 10-15).

REASONS FOR GRANTING THE WRIT

The Louisiana First Judicial District Court acted beyond the scope of its judicial authority as empowered by the state legislature when it rendered judgment in Cain v. Cain on October 5, 2004. The courts judgment unlawfully enforces and deprives petitioners rights, duties and privileges in direct violation of US Constitution Amendment XIV. The Louisiana Second Circuit Court of Appeal breeched judicial ethical obligations and legal duties owed to the public in the administration of justice when as a review court it contradictorily re-weighed and contradictorily restated and misstated trial court proceedings as recorded in the trial court transcripts. The United States Constitution guarantees protection against such state usurpations.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Louisiana 2nd Circuit Court of Appeal in Cain v. Cain CA 39903 should be reversed to joint custody. Petitioner has exhausted all state appeal remedies available for redress and herein remains sufferable to irreparable damage and herein relies on this Writ of Certiorari to the US Supreme Court to remedy.

THE WITNESS: Well, my dad is giving my mom a lot of grief.

THE COURT: Do what?

THE WITNESS: Like, every Friday we would – after school we would do whatever we had to do, like our homework, and we would get our stuff and we would go over to our dad's. And before that some of the times we'd forget our stuff at our other house -- at my mom's house -- - - because we were at my grandparents' house, and he would get mad at us and start yelling and screaming. And then he gave basically my mom, my grandfather and my grandmother the bird, the finger a lot. He's done that a whole bunch.

THE COURT: Did you ever hear him cussing?

The COURT: Okay. Anything else? What do you want to do? Do you want to continue to live with your mama?

THE WITNESS: Well, that's fine with me right now.

THE COURT: Anything else.

THE WITNESS: No, Sir.

THE COURT: All right. Go have a good day.

(Witness excused)

(Where a recess was taken, after which the following proceedings were had in court)

THE COURT: Well, I had an opportunity to meet with Adam and with Jacob, two fine boys. You can tell that Adam is the oldest and the most mature, a good kid.

I don't know where to start, so I may ramble a little bit in what I have to say. If I do, I apologize for that, but I'm going to get to all the answers before it's all over with. Adam did tell me that his daddy wants him to be a doctor. I asked him, God forbid, what does he want. He gave a good thirteen-year-old answer: "I don't know. He doesn't. Sir, you put too much pressure on them. I've seen that here in this courtroom. Neither one of them told me that directly.

I find it ironic, and I generally don't go into a lot of what the boys tell me, but I found one thing very interesting, and

it came from the questions that were suggested from your own attorney: "What's the one thing that you would change about your parent, your mother?" One response was, "Nothing, about my mother." And the other response, "I don't know." But both of them with you was temper. Temper and temperament. They think you have a temper.

But the encouraging thing out of the whole thing is they love their mother and they love their father and they think their mother and their father both love them. That's not a problem. If I did nothing in this case to your dislike, Mr. Cain, would be I don't think it would bother the boys.

One thing that really surprises me – well, I wouldn't say it surprises me. The boys are very close to their maternal grandpa, grandparents. They like their grandparents. And a lot of time when I interview kids at this age, they may like them, but it doesn't come across as strong. It wasn't anything they said bubbly. I just perceived from them that they enjoyed their grandparents, which is a compliment. And I think from what I gathered from the stand, I imagine they spend a lot of time with their grandparents, because I think Ms. Cole or Ms. May works a lot, and Mr. Cain you been away.

The bottom line is the issues in this case are should there be sole custody or leave it as joint custody. One thing that has not been what shall I say – has not been contested in this lawsuit is that Mr. Cain and Ms. May don't communicate and don't talk. I think It would be ridiculous to have joint custody. I'm going to award sole custody to Ms. May. I think she'll make the day-to-day decisions in the boys' lives.

One thing that does bother me sitting up here is I do not think the boys are scared of the father. The visitation plan gives me a lot of problems. Sir, point blank, everybody has told you this and you have elected not heed to it. You said you discussed it with the boys and y'all decided that you didn't want supervised visitation. I don't believe that. I believe that you may have semi-talked to the boys or told

them why you didn't wan t to do it, but I can't understand why you didn't go to the psychiatrist and then have supervised visitation. These are two fine young men that I think you want to spend time with.

Ms. May has now gone on with her life and has remarried. You don't have the same open door relationship with you boys that you want. And what I mean by that, you don't have the right just to show up at her house, which you have done in the past. Y'all are divorced. She is remarried. You should have a relationship with your sons, but it should be visitation. The boys don't want every weekend, but they want to see their father, and they qualified it. I don't know how to handle that to be honest.

I am going to appoint Dr Pat Sewell, and I m going to order that you go see Dr Pat Sewell and I'm going to do something, and I don't know if I've ever done this in another case. I am going to review this case, and in three months after you have had the opportunity to met with Dr. Pat Sewell, I m going to have Dr. Pat Sewell come back into this court. Until that time, I am going to give you Saturday mornings at 10:00 until Saturday afternoon at 6:00 unsupervised. But you cannot remove the boys from Caddo or Bossier Parish. I do not think he's a threat to the sons. Plus I think the boys are of such an age and of such a nature that if they were in danger, I think they would tell you and it would come back to this court.

I am going to wait until I review it in three months, and whether you go see Dr. Sewell or not is your business. If you don't, I may take away that Saturday visitation. If you go see Dr. Sewell and you are very open with him and discuss your problems with him and he makes another diagnosis and he says you need medication or you need treatment for bipolar or he says you're not bipolar, I'll address that. We're not going to have another trial on it. Don't misunderstand me, attorneys. We're not coming back to that. What I am going to do is I'm ordering that he go see Dr. Sewell but I don't want to deny him the visitation now.

I am not ordering on Sunday – what ya'll do on Sunday is between y'all. I just don't thing it's healthy – I won't say healthy –I don't think its natural, I guess is better word. You go to church. Your boys say they see you for a couple of minutes before church, and evidently when the preacher closed the services they get up and they go back to their grandfather and their mother and they leave. That's not visitation. You may have five minutes or ten minutes of talking before the service starts, or you may have some – well, I hate to say this. The preacher may not like me saying this, but there may be some lull in the service where you have the opportunity. But you can't talk t them about what they're doing or not doing at that point.

These Saturdays – I'm doing this because I've talked to the boy and I think the boys want t see you. Sir, this quality time you've got to spend with your sons. Reading a medical book is not quality time. Maybe reading Tom Sawyer may be. I do not de-emphasize education at all. Trust me on that. But also on the same nature I cannot conceive of just sitting down on Saturday afternoon and saying, "Okay, here's this book. Read it," and it be a medical journal or a medical book or whatnot. And everybody wants what's best for their children, and you do, too.

But this time of their lives and with the problems that y'all have had in the communications, they have witnessed your temper, they have witnessed you and your ex-wife having problems, they think that you have cursed her, and they have seen stuff they shouldn't have been subjected to.

One of the two boys even made the statement -- and I asked him, and this is the way I asked the question: "When you go to your friend's house and you spend time with your friends, is it different with their father than it is with your father?" He said, "Well, yeah, because they aren't divorced." I said no I'm not talking about that. I'm talking about the relationship that those guys have with their sons when you're around as opposed to you and your dad." And they said – one of them said –one didn't understand the question, and I went right on. But Adam, your older son

did. And he said, "Yeah, It's different. But my daddy has a temper at times."

And the point I'm trying to make: Your time will be much better spent going to the park, throwing the baseball, watching a football game, going to a movie, doing something quality time with them right now. Their home work is going t be done on Saturday, or should be done on Saturday unless they have a special project. This ought to be time for you to have a good time with your sons and not put pressure on them. That's the way I feel.

At first I was going to limit it to more than that, but I don't see a thing wrong with having that Saturday during the day, and I don't think the boys are in harm's way at all. If I misread this one and you were bipolar to the point of were you have a problem and something happens to either one of these you men or you do something self inflicted to yourself, I will have to live with myself, and I'll tell you, that would be awful tough, because these are two fine young men. But I think you believe that, also, and I don't believe you would harm them. I hope I haven't misread that one. I really do.

And the boys, both of them -- and I used word "scared" or "frightened" of the mother or the father. They never feel harmed or threatened by either of y'all. They love both of you, which is good at that age. But I think you ought to have some time with the boys but I also think you ought to make that appointment with Dr. Pat Sewell, you ought to get evaluated, and then we'll come back and I will review it and I will set the visitation that he is to have every other Saturday until we come back to court.

MR BOWERS: Starting this Saturday?

THE COURT: Yes, that will be fine.

MR. KAMMER: Is the injunction still in place for harassment?

THE COURT: Oh. Yes.

MR. KAMMER: Exchanges?

THE COURT: Give me a suggestion on that. I'll listen to both of you. I don't think the two of them ought to meet somewhere. Dr. Vigen says he thinks the person ought to come and get – isn't that what he testified to?

MR KAMMER: No, actually if it's his turn to have the child, she should actually drop off and he should bring home; is that correct?

MR BOWERS: You're asking me?

MR. KAMMER: I mean, is that what Dr. Vigen said?

MR BOWERS: Yeah. I think his answer was in the context of in generaL, anD I don't think that's--

THE COURT: Hold on one second. I'm going to take the two attorneys out of it. Ms. May, how do you want the exchange to be?

MS. MAY: I haven't really thought about it. I'm open. I'm open. It can happen at my parents' house. I really don't know if I want to meet at the church like we did previously. I don't know. I'm open.

THE COURT: Where do you live? Where is Chelsea Street?

MS MAY: It's in Broadmoor.

THE COURT: Where do you live?

MR.CAIN: Braelock. It's out in West Shreveport.

THE COURT: Do you want to pick them up?

MR CAIN: I'd like it to be shared equally, yes. No sense having the extra burden.

THE COURT: What I'm thinking, sir, you say you want it shared equally. See, I disagree with you. Why not you pick them up and you drop them off? And here is my reasoning for it: That gives you fifteen or twenty minutes more time. If you want to see the children, that's where you get your time. The lawyers are looking at me, "What do you mean?" Because I'll tell you why: You ride in a car with two kids across town, you will find out more what's going on in their life than sitting in the house with them half a day. They will talk to you sometimes, if you don't have the music up too darn loud.

MR CAIN: The only thing I have with that, you Honor, is a place that's neutral.

THE COURT: Well, I'm fixing to say that. I have no problem with it being the grandparents' house or her house. You don't get out to the car. The boys don't need assistance opening the door. They don't need assistance getting there bags. They don't need anything. There is absolutely no reason what so ever for you to get out of the car. You pull up in the car. And what time did I say, 9:00?

MR KAMMER: You said 10:00

THE COURT: Ten o'clock. When you pull up in that drive way, she knows that they're to be ready at 10:00, not 10:30, and not 10:45, not11:00. At five or ten till 10:00 their bags ought to be by the front door. Well they don't even need a bag. Whatever they're going to take for the day. I mean, I say that, but they ought to take a change of clothes if they're going to do something. They may throw a bag in the back seat in case they need it. But bottom line is you don't know if they're going skating, you don't know if they're going swimming. You don't know what they're going to go. A baseball glove.

One thing I will say. This surprised me. I thought Jacob was probably the better ball player because he was saying all about the All Stars. Adam says he doesn't know if he wants to play in high school. Jacob says he could care less if he plays baseball. He could care less. And that always bothers me when a kid has that much talent at that young age. Why is he already burned out? Does he not want a confrontation?

And I asked him. I said "Are you lazy?" And he said, "I don't know." I said, "What do you do, play Xbox? No, I don't play Playstation 2." Which is a surprising answer, because that's what 90 percent of the kids – he likes horseback riding. He just likes doing other things. But I don't know if all are going to throw the football around. It's football. It's not baseball season. Shoot Hoops. It doesn't matter. Do something. But he may want to take something.

They ought to have their bag. They ought to take something with them. You know, this Saturday it may rain. They ought to have something in case it does rain, stuff like that.

Now, when they've got to be back, that doesn't mean extending it five or ten minutes. You're much better off to drive back up in that driveway at five minutes before you're supposed to get there. You don't set those parameters. There's not a window. There no excuse short of some traffic problems, but you ought to allow for that. You've only go a few hours. You might not want to take them back to the house and just sit at the house. You may want to do some activities on this side of town. I'm trying to re -- I'm not saying reestablish. They know who you are. But you need to establish some quality time with them. That's what I get out of this.

MR KAMMER: So at her house or --

MR BOWERS: Can we do it at her dad's house right down the street?

THE COURT: I have no problem with that. That puts more burden on her. Ma'am, there's no excuse. They've got to be there at whatever time. They ought to be there ten or fifteen minutes early. Have their stuff ready. Be ready to walk out the door when daddy pulls up. I mean, when he pulls up in the driveway he shouldn't even have to honk the horn. They ought to be looking out the window and they go out and they get in the car.

When he pulls back in the driveway, sir, there's no reason at all for you to get out of that car. None. There should be no confrontation at the door between you, her, her daddy, anybody. You pull up, act like a reasonable adult, let them get out of the car, let them walk up to the door. You see them get to the grandparents front door, you wave them goodbye, say," I love you and I'll talk at you later, and you leave at a normal rate of speed.

You don't send child support checks. You don't send notes. You don't send any thing through the kids. Any communications should be via a letter if ya'll can't talk --

through Mr. Kammer to Mr. Bowers or vice versa, but you're going to find out it will be expensive to you. You can write the letter and just mail it to her and vice versa. Y'all have no communication. I disagree with that. To me ya'll are both smart, intelligent people. If you can't talk without getting mad, you can at least write it down. I may get mad at Gary or Pete, but I can at least write them a letter.

And also, I'll tell you I almost put you in anger management classes because I'm afraid your temperament is there, but I'm leaving that up to Dr. Pat Sewell, and I'm ordering that you contact Dr Sewell within 48 hours of now to set an appointment. If something happens and Mr. Pat Sewell will not do it, then the next suggestion I would use would be Dr. Cliff Dopson. But I'm ordering Dr Pat Sewell first.

And I purposely did not use Dr. Seiden because Dr. Seiden, if I understand the testimony during the trial , shares office space with Dr. Williams. And I can understand some animosity – I won't say animosity, but I wouldn't feel comfortable going to somebody who shared space with somebody I'd already had a problem with.

MR KAMMER: What are the parameters on sending documents, communication with Dr. Sewell? Is there none? Is it strictly up to him? Do we submit them to the court and the court is going to send him stuff? How does that work?

THE COURT: Dr. Sewell is not going to be able to see him this week , so I would suggest that Mr. Bowers writes a letter that he wants to submit to Dr. Sewell on behalf of this client as to a history, and that Mr. Kammer writes one that he wants to submit to Dr. Sewell on behalf of his client as a history, and then you will have to exchange them. If any body finds anything negative in the other person's letter, then you can argue it with the form and content of the judgment to me.

MR BOWERS: When you say "negative" you mean --

THE COURT: In other words, if you put something in your letter that Mr. Kammer doesn't want Dr Sewell to know or your synopsis of what the evidence was at the trial and he says, "I don't think that perceived as right," then I'll look at it and see whether that's part of the history that I want to go with.

MR. BOWERS: You're talking about whether it's factually correct? Because some of the things I would tell Dr. Sewell certainly would be negative, but they would be factually correct.

THE COURT: Yes.

MR BOWERS: Do you understand the difference?

THE COURT: When I say "negative" what I meant was, you can do a history that you want to submit to him for the relationship between the two and what you claim his problem may or may not be, and Pete, you do the same thing, and then I will look at it. If I think it's something that should not be in the history for whatever reason, I would say that. If I think it's irrelevant, I would say it.

But Dr. Sewell may go on past whatever I say or any one of the three of us say anyway. Dr. Sewell has the open hand to evaluate him and to see whether he diagnoses him and what medications if any they think he needs. We've had conflicting testimony here. Some say he needs it some say he may not. And Sewell may come back in and say no. But sir, I would suggest to you that you be exemplarily (sic) honest and candid with him on everything and I'll leave it at that.

MR. KAMMER: Are there any restrictions on the games and practices?

THE COURT: I can't hear you.

MR. KAMMER: Are there any restrictions on him going to the games and practices of the kids?

THE COURT: I think we can address that when I do the review within three months, because neither one of them told me that they're playing anything at this time. Neither one of them are playing fall baseball, I don't think.

MS. MAY: Adam is.

THE COURT: I don't think the practices. I think he ought to have free reign to go to the games, but I don't think practices should be a potential confrontation at this time. If he was helping to coach, I would look at that different, but he's not coaching at this time, and I don't think we ought to add to that.

MR KAMMER: I think he said Dr. Cliff Dopson used to be her --or she may have had a relationship with him from a treatment standpoint.

MS MAY: He was the psychiatrist in a group.

THE COURT: I was just using Dopson so if something happened you wouldn't have to come back and ask me another name. We'll leave it with Pat Sewell. If that a problem, then we'll go with somebody else.

MR. KAMMER: And the usual no discussing question or court with the children.

THE COURT: yes I don't have any problem with that.

MR BOWERS: What?

MR KAMMER: No discussing court or asking the kids about the question and what even on here.

THE COURT: Well, let me say something with respect to that. These kids are intelligent enough to know they went to court. They're going to want to know what happened today. They're going to know what happens. They're going to know that daddy has every Saturday, and its going to be different next Saturday. I mean they're not stupid. Now, I will say that I don't want Mr. Cain discussing Ms. May in any way with the boys, nor do I want Ms. May discussing Mr. Cain with the boys, You need to say this or that in court," that type of thing.

MR BOWERS: Or no disparaging remarks.

THE COURT: Yes. If the boys ask you what did the judge do, I mean, I don't see a thing wrong with saying the judge awarded sole custody. Now if you take that a step further to say and I use for an example – I'll us e Mr. Cain. I'm not

picking on you. Well, the idiot in the black robe, this is what he did. And he said this, and if you don't say that or if you'll say this then may be I'll get more next time. That's gone too far. That's what I'm saying.

What you can say is that the judge awarded sole custody and I get visitation and I have to go see Dr. Sewell. I don't like that but that what I've go to do to see you. That's enough said. I don't see a thing wrong with. If you start saying -- and neither one of these boys -- and I asked both of them if mamma or daddy or anybody else had said anything to influence their testimony today, and the said no. Adam knew more why he was there. Jacob got kind of confused, but he knew he was in court, and he knew y'all were having problems over custody. But neither one of them came with their little note cards or with their memorized speech type deal. They weren't that way. They were very--I don't want to use the word entertaining. That's not fitting. I don't know the right word.. It was a pleasure to interview the two boys. That's what I m trying to say. I was impressed with them. They're smart, and especially Adam. Now, Jacob is younger. He's young. He's a fifth grader. Adam is very intelligent, carries him self very well.

MR BOWERS: What if Dr. Sewell recommends to Mr. Cain that he take some type of psychiatric medication as was referred to by Dr. Williams and Dr. Stevens and all that? I mean are you addressing that now or --

THE COURT: Yes he's going to have to take it.

MR BOWERS: I'm sorry?

THE COURT: Yes, he's going to have to take it. Whatever Dr. Sewell -- I don't want Dr Sewell being told by Dr. Williams or Dr. Staats or Dr. Stevens what he's going to do. I want Dr. Sewell to do his own evaluation. But if Dr Sewell says, "I think these factors are present or I think he needs this, it could be anger management, it could be medication, it could be group therapy, it could be individual therapy, it could be anything. I don't have a clue what he's going to

say. But if he says that what you've got to do, then that's what I expect done, pure and simple.

And when we review this case in about three month and you come back here in three months and Dr Sewell take the stand y'all aren't going to get him. I'm going to get him. I'm going to say, "I'm strictly here on a review. Has he come and met with you? What were your findings? What were you recommendations? Has he done it?" I disagree with Dr. Vigen's report that whatever his findings are he ought to send back to Dr. Williams so Dr. Williams willl know if he's complying. Dr Williams is out of it. Dr. Vigen is out of it. They were court appointed experts. Right now I am appointing Dr. Pat Sewell. He's the one that's overseeing what he does. And when I put Dr. Sewell on the stand, " have you prescribed it? Is he taking it? And they said that sometimes they need to take blood tests or they need to do follw-ups. Whatever they need to do that's going to be his baby. He's not on it for an evaluation for court purposes. That is a condition of his visitation right now, and I see that as a distinct difference other than going the evaluation. Do ya'll understand what I'm trying to say?

MR BOWERS: I'm running with you.

THE COURT: MR. KAMMER?

MR. KAMMER: I understand.

MR. BOWERS: Do you want to pick a date now to come back?

THE COURT: Yes.

MR BOWERS: You said about three months. That would be in December sometime?

THE COURT: I will put it back on for review, I'm going to say, the first Monday in December. That gives him all of October and November.

MR. BOWERS: I've got Judge Nesbitt's partition trial that going to be around that time.

THE COURT: What about the 6th or the 13th

MR. Bowers: The 13th

THE COURT: December the 13th

MR KAMMER: And for the record you said every other Saturday, then you said every Saturday.

THE COURT: I meant every other Saturday. If I said every Saturday, I'm incorrect. It's every other weekend.

MR KAMMER: And form and content?

THE COURT: Y'all tell me. You can do it this Thursday or next Friday.

MR KAMMER: I'll be gone Thursday and Friday

THE COURT: We can do it Friday, October the 1st.

MR KAMMER: That will be fine.

THTE COURT: I don't see where there will be a problem. The only problem with doing the 1st, if he gets an appointment prior to that with Dr. Sewell, the history sheet that Mr. Bowers and you are to submit to Dr. Sewell y'all might want to submit it to me. That still gives him nine weeks to evaluate him. That's plenty. That's fine October 1st. Anything further?

MR KAMMER: No sir.

MR BOWERS When you say the letter that you were making reference to Mr. Kammer and I sending to Dr Sewell, do you contemplate in that letter that we can have anything that would be enclosed with it like the mental health professional's report, the Charter Forest chart anything like that.

THE COURT: No, and the reason I say that right off -- no. I want it to be Pat Sewell looking at it. If Dr. Sewell wants to come back and ask for that, that's fine. Let me think about that a second before I make that definitive.

MR BOWERS: I mean, those things are sort of important and we had a disclosure problem with Dr. --

THE COURT" I understand we had a disclosure problem That what I'm thinking about right now. I'll listen to you and Mr. Kammer say what y'all think with respect to that right now. I did say no, but I may be wrong on that.

MR. BOWERS: All right. Well I'll tell you why I think we ought to be able to address some of that background and supply some of that data, or at least make a reference to it in the letter, and if they want to have access to it, then he can request either I or Mr. Kammer to furnish it to him.

You heard the testimony from Dr. Williams and Dr. Vigen that there was dishonesty there. I think I put more than ample evidence on during the trial to show that Mr.. Cain has a problem with telling the truth. Even the testimony he gave the court about whether or not he had threatened Dr. Stevens with filing those ethics complaints that was perjurious testimony. I don't know what assurance we're going to have that Dr. Sewell gets an accurate history unless we have some ability to point him in the right direction'

THE COURT: Mr Kammer, what do you have to say to that?

MR KAMMER: I mean, my problem is first of all I don't want any exparte communications, and phone calls from any attorney. I think it needs to be handled through the court. But the problem is, I don't want to spend all the therapy session defending stuff that happened ten years ago, defending what the other experts have said. I mean, I think it's appropriate to just basically say, you know, he's had these experts come ..., he was diagnosed with this --

THE COURT: Here is what I will order. You can do your history. There will be no ex parte communication between either attorney with Dr Sewell I will order that both Gerald Baker's and the Vigens' MMPI tests both be submitted to him, and Dr. Goldwasser's report and Dr. Vigen's report both be submitted to Dr. Pat Sewell.

MR BOWERS: You mean just the written report from Goldwasser not the deposition?

THE COURT: Right, just the written report. I think that shows -- what that shows, if I remember correctly, I did not see a report from Dr Baker. I don't think he actually issued

one, and really don't think that Dr Sewell is going to spend the time to read the deposition that I did.

I think in essence what we have done there – the realo two conflicts is by sending those two reports to him, you have the Vigens who say that there was deception and that they have made reference to Charter Forest, and that will put Dr. Sewell on notice, then he will do whatever test he wants to do. And then you've got Dr. Goldwasser who says, "I disagree with that, basically." So you've got both points right there. And then you've got the two MMPIs there, which I think both -- from what I read of Dr. Baker's, if I understood his deposition correctly, the conclusions may be a little bit different than Dr. Vigen today when he said it. I did not realize that 65 percent line was where the break was. But at any rate they both show a consistency, but I think that's enough for Dr Sewell to start with. I really do.

And Mr. Bowers, I'm going to stop you and Mr Kammer at the beginning. I don't want a five page letter dissertation. Bottom line is I think it ought to be a one page synopsis of what you say the history is. The history should just basically be that y'all think -- you rely on Dr. Vigen's report that he's got bipolar disorder and did not take his medication, did not go to the doctor, and you think he ought to be evaluated and ought to have some type of supervision or at least some type of overseeing when he's having his visitation, and enclose the following. And Mr. Kammer you say the opposite, The bottom line is you think that he ought to be evaluated and you disagree with that analysis.

I don't think that we need to go through with a four or five page letter. You may mention that your allegations are that he threatened her, but he's denied that. So I mean, we don't need to go through that. I mean you can make that allegation, but really the allegations are very simple in this case. Y'all have had discord over the time. You don't communicate. But that does not in and of itself mean that we have a mental illness. I want Dr. Sewell to do his own evaluation, but he does need that history to start with. And

personally I think that Dr. Vigen's report will be enough of a history for him to get started.

MR BOWERS: When you say Dr. Vigen , you mean the mental health --

THE COURT: I'm calling it Dr. Vigen. It/s Vigen, Vigen and Williams.

MR BOWERS Right. I just wanted to make sure were on the same page

THE COURT: Any other clarifications?

MR KAMMER: Assuming he does his treatment, he does whatever Dr Sewell asks him to, what's at the end of that tunnel?

THE COURT: I'll make that decision on December the 13th

MR KAMMER: In the review, everything is on the table at the review?

THE COURT: No, sir. Right now I'm giving him -- bottom line is I'm giving sole custody with the visitation that I just gave him. No I'm not doing it. I'm leaving it at sole custody. In the review I may change what the visitation schedule is. Right now they have suggested that it be only supervised visitation, no extended visitation. I'm extending that to say you get them on Saturdays. And I am not at this point saying whether it will be holiday visitation, extended visitation. I've already got that. I've already got the report that says they differ with it. But I want to hear from Mr. Sewell an independent evaluation to see what he says, and I will make that review at that time.

It's not another trial on December the 13th. On December the 13 the Court is reviewing its order to see if the court on its own motion, whether I want to modify that visitation schedule that I'm setting right now. I'm not willing to etch one in stone right now without reviewing it.

MR BOWERS: What about expert witness fees for the mental health professionals and Dr. Stevens?

THE COURT: I think the Court costs goes against the defendant.

MR KAMMER: We would object to that. We haven't seen a bill from Dr. Williams. There's a big issue about ex parte communications with him. He didn't have his bill, didn't have his transcript. I request to be able to look at those before the court sets that.

THE COURT: I will say that the bill – that's right. Any cost that was associated that was not through --

MR KAMMER: I mean, I think the cost should be limited up to the report. I think any thing else after that --

MR BOWERS:You know some of the time I had to spend with Dr Williams was to try to deal with his deception of Dr. Williams.

THE COURT: That's true.

MR BOWERS: If he had told the truth, I wouldn't have had to spend the time I had to spend trying to get this on the right course.

MR KAMMER: If we had handled it properly, it would have been a little different.

MR BOWERS: You know, I object to that reference. I handled it properly. There's no order that precluded me from sending these materials to Dr. Goldwasser. My objective is to get to the truth. Mr. Cain's objective was to obfuscate the truth from the court.

THE COURT: Everything you said right there was good until you threw your last dart. There's no need to throw that dart back. But the bottom line is I'm going to say the defendant pays the cost. Anything further?

MR BOWERS I'll prepare a draft of the judgment and submit it to Mr. Kammer so he can cover that before October the 1st

MR KAMMER: Thank you, your Honor

THE COURT: If you get it to me and get the letter to me, there's no need to come back on October 1st.

MR BOWERS: Yes sir.

(Whereupon the proceedings were adjourned in this matter)

before the first visitation, which I assume has already taken place --

MR BOWERS: And I'd like to address that.

THE COURT: Well, you can pick up your phone, call and say, Mr. Kammer, has he made an appointment with Dr. Sewell.

MR BOWERS: I have done -- I've faxed Mr. Kammer four letters.

THE COURT: I'm asking him.

MR KAMMER: All within 24 hours.

MR BOWERS: That's not true.

MR KAMMER: I'm just picking Gary.

THE COURT: Hold on

(where upon, the proceedings were momentarily at ease.)

THE COURT: All right. Go ahead. Well, my question hasn't been answered. Has he called and made an appointment?

MR KAMMER: He called Dr. Sewell to make an appointment. Apparently he is in Italy through October, and won't be back until then and he doesn't do legal cases anyway.

MR BOWERS: Never been told that

THE COURT: I believe what I said was --

MR KAMMER: I just found out about it while I was waiting in court. Somebody called me over there.

THE COURT: When did you find that out?

MR KAMMER: When I was sitting down there waiting for you to come down.

THE COURT: But didn't I say when we finished this trial, in the eveat Dr. Sewell is not available, call me? And nobody – now I'm just now finding out?

MR KAMMER: Probably 30 minutes after I found out.

THE COURT: Yeah, but why -- I can't believe that I didn't say it. Maybe it was an oversight on my part. But I generally say they have to call within 48 hours.

MR BOWERS: You did say that . You ordered him to do that.

THE COURT: When was 48 hours?

MR BOWERS: 48 hours would have been --

MR KAMMER: Two weeks ago.

MR BOWERS: -- weeks ago. I faxed him on the 23rd of September, the 24th of September.

THE COURT: Then why am I just now and you just now finding out?

MR. KAMMER: I don't know.

THE COURT: His visitation are suspended until after he has an appointment with Dr. Sewell or Dr. Sewell's replacement. Period

M\R KAMMER: Who is replacement"

THE COURT: I don't know.

MR KAMMER: And that's a separate judgment we are doing?

MR BOWERS: I'll put I in this one.

THE COURT: No. I want it in this one, to go in this one. I think that is playing a game with the court and that's why I havd the 48 hours specifically. And I'll address something else with that in a moment, but I can't remember who the other names were.

MR BOWERS: Cliff Dopson was the only other one you made reference to. You excluded George Seiden in your ruling.

THE COURT: All right. Then I'll use Dr. Cliff Dopson

MR KAMMER: But I think she uses him and she has already used him once.

MS CAIN: He was a psychiatrist in a group.

MR BOWERS: Way back, years ago. So if you want to come up with somebody else, come up with somebody else.

THE COURT: Do you have somebody else you want to suggest?

MR KAMMER: Can you give me till Monday?

THE COURT: If y'all cannot mutually agree upon one to put in the judgment then call me Monday, and I order that you try to mutually pick one out, and call me on a conference call Monday or get my approval. I would at least like to know the mane before I do it, because I may not agree with it. I assume if y'all agree, I'll agree. All right. Continue.

MR. BOWERS: So is that paragraph nine okay? Partcularly in light of the fact of what you just learned?

THE COURT: Well, yeah, I'll leave it in because otherwise until he gives notice he is there I assume he'll have an appointment prior to the time that we -- his next visitation comes, otherwise, his visitation is suspended. If he goes to the doctor and notified Mr. Bowers the minute he has had the...

ANNE MARIE COLE CAIN :	NUMBER 417793 FIRST JUDICIAL
VERSUS :	DISTRICT COURT
KEVIN JOHN CAIN :	CADDO PARISH, LOUISIANA
(Judgment rendered October 5,2004)	
PERMANENT ASSIGNMENT:	SECTION E (WADDELL)

JUDGMENT

THIS MATTER having come before the Court for trial on September 13, 2004 in connection with the Petition filed herein by Anne Marie Cole on January 7,2003, both parties being present and represented by their respective attorneys of record; evidence being adduced; for reasons orally assigned.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of ANNE MARIE COLE and against KEVIN JOHN CAIN modifying the Judgment previously rendered in tehse proceeding on August 19, 1997 to provide that an Order of sole coustody of the minor children be awarded to ANNE MARIE COLE.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Temporary Restraining Order granted in the Interim Order rendered in these proceedings on February 11,2003 be converted to a permanent injunction permanently enjoining KEVIN JOHN CAIN from threatening, harming or harassing ANNE MARIE COLE in any manner whatsoever.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall attempt, nor condone any attempt, directly or indirectly , to estrange the children form the other parent or injure or impair the mutual love and affection of the children. Neither parent shall speak in derogatory terms about the other parent, nor shall KEVIN JOHN CAIN speak in derogatory terms

about the spouse of the Anne Marie Cole or the parents of Anne Marie Cole while in the presence of the children.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of ANNE MARIE COLE and against KEVIN JOHN CAIN for all costs of these proceedings, including:1) All court costs incurred with the Caddo Parish Clerk of Court.

2) All costs incurred by both parities in connection with the mental health professionals appointed by the court (Dr Richard Williams, Dr. Mark Vigen and Dr. Susan Vigen);

3) Expert witness fees of Dr. Lee Stevens fixed in the amount of $250.00

4) The court in the amount of $600 (payable to Court Reported Shannon Dinnerville) for the transcription of the audio tape of the interview by Dr. Alberto Goldwaser of KEVIN JOHN CAIN on October 23, 2003 in the amount of $600.00 which transcript was filed into evidence as Exhibit P-2 and P-3.

5) The cost in the amount of $35 (payable to Court Reporter Lisa McClure) for the transcription of the testimony of KEVIN JOHN CAIN for the proceedings on May 21, 2004, which transcript was filed into evidence as Exhibit P-13.

IT IS FURTHER OREDERED, ADJUDGED AND DECREED that KEVIN JOHN CAIN shall do the following outlined herein below:

1) KEVIN JOHN CAIN shall contact the office of Dr.. Patrick Sewell (868-7740; 3311 Line Ave Shreveport, Louisiana 71104) within 48 hours of the rendition of this Judgment on September 20, 2004 for the purpose of arranging an appointment with Dr. Sewell as soon as possible and as further describe herein below. Neither counsel for ANNE MARIE COLE nor counsel for KEVIN JOHN CAIN shall contact Dr. Sewell other than by directing to the attention of Dr. Sewell a one page letter wherein each counsel may explain to Dr. Sewell and explanation of the underlying facts established during the trial of this case and include with such correspondence of a copy of the following documents:

A) The written report of the mental health professionals appointed by the Court (Dr. Richard Williams, Dr Mark Vigen Dr. Susan Vigen);

B) a copy of the written report of Dr. Alberto Goldwaser;

C) A copy of the MMPI test datã performed by either Dr. Tom Staats, Dr Mark Vigen and/or Dr.Gerald Baker and,

D) a copy of this judgment

The initial transmittal letter referenced hereinabove shall be exchanged by and between counsel for review and approval in advance of mailing to Dr. Sewell. In the event that an objection is raised about the content of the subject transmittal letter by counsel for either party, then in that event the transmittal letter shall b e tendered to the Court for review and approval prior to mailing to Dr. Sewell shall contact both counsel jointly in writing and direct his request for such documents, records or comparable data to both counsel of record. In the event that such a request is made of both counsel of record by Dr. Sewell for supplemental documents, records or comparable data, then in that event, either counsel may transmit to Dr Sewell the requested supplemental data and copy opposing counsel with the transmittal letter.

2) KEVIN JOHN CAIN shall be evaluated by Dr. Patrick Sewell at the sole expense of KEVIN JOHN CAIN for the purpose of determining whether or not KEVIN JOHN CAIN has any form of mental illness, personality disorder or psychiatric condition that require and form of testing, treatment, therapy , medication ,or anger management therapy//counseling or other form of medical/psychiatric intervention. KEVIN JOHN CAIN is specifically ordered to cooperate with Dr. Sewell in any manner directed by Dr. Sewell so as to facilitate the evaluation and treatment of KEVIN JOHN CAIN.

3) KEVIN JOHN CAIN through his attorney of record shall immediately notify the Court and counsel for ANNE MARIIE COLE as to the date of his initial appointment with Dr. Sewell and thereafter, he shall notify the Court and counsel for ANNE MAIRE COLE of the date of all follow up appointments with Dr Sewell, until further Orders of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that effective Saturday, September 25,, 2004 KEVIN JOHN CAIN shall have unsupervised visitation with the minor children from the time that he picks up the children at the home of the children's grandfather (William Jefferson Cole) located at 174 Chelsea Drive, Shreveport, Louisiana at 10:00 a.m. and until such time as he returns the children to the home of the children's grandfather on or before 6:00 p.m. This visitation shall take place every other Saturday thereafter and until further orders of this court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the visitation referenced hereinabove shall be predicated upon the full compliance of KEVIN JOHN CAIN with the medical treatment referenced hereinabove.

IT IS FURTHER ODERED, ADJUDGED AND DECREEDED that during the period of visitation referenced herein, KEVIBN JOHN CAIN shall not remove the children from Caddo Parish or Bossier Parish, Louisiana.

IT IS FUTHER ORDERED, ADJUDGED AND DECREED that during the period of visitation referenced herein, KEVIN JOHN CAIN shall not compel the children to read medical books.

IT IS FURTHER ORDERED, ADJUUDGED, AND DECREED that:

1) ANNE-MAIRE COLE and KEVIN JOHN CAIN shall not use the children for the purpose of communicating with each other.

2) KEVIN JOHN CAIN shall not give to the children any child support checks, notes, memorandum. letters, or other written paraphenalia for the purpose of delivery by the children to ANNE MARIE COLE;

3) KEVIN JOHN CAIN and ANNE MARIE COLE shall not discuss any aspect of this litigation with the children, including, but certainly not limited to , the testimony that the children provided to the court in chambers during the trial proceedings.

IT IS FURTHER ORDEREED, ADJUDGED AND DECREED that as long as KEVIN JOHN CAIN is in compliance with this Judgment in every respect, then in that event, he may attend as a spectator any baseball games of either of the children that should occur on a day other than his visitation, however, KEVIN JOHN

CAIN shall not approach ANNE MARIE COLE or the minor children while in attendance at the baseball game. KEVIN JOHN CAIN shall not attend any sports practice session of the children until further orders of this court.

IT IS FURTHER, ORDERED, ADJUDGED AND DECREED that this case shall be returned to the Court's docket on December 13, 2004 for further proceedings and without further notice to the parties for the purpose of a review by the court to determine the compliance of KEVIN JOHN CAIN with the terms and provisions of the Judgment, including but certainly not limited to, the referral of KEVIN JOHN CAIN to Dr. Patrick Sewell as provided for in detail hereinabove.

JUDGEMENT RENDERED September 21, 2004; Judgment read, signed and filed on the 5th day of October, 2004, Shreveport Caddo Parish Louisiana.

s/ ROBERT P. WADDELL,
DISTRICT JUDGE

ORDER

THIS MATTER having come before the Court for argument on the form and content of the Judgment rendered by this Court on September 21, 2004 ANNE MAIRIE COLE being present and represented by her attorney of record; KEVIN JOHN CAIN not being present but represented by his attorney of record; evidence being adduced; the law and evidence being in favor thereof; for reasons orally assigned:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of ANNE MAIRE COLE and against KEVIN JOHN CAIN further modifying the judgment previously rendered in these proceeding on September 21, 2004 in the following respects:

The visitation provided for by the court in the Judgment rendered in these proceeding on September 21, 23003 shall be suspended until such time as KEVIN JOHN CAIN shall physically appear at the office of Dr. Patrick Sewell for his initial visit, as provided for in the Judgment rendered on September 21, 2004, and conditioned upon KEVIN JOHN CAIN providing through his

counsel to counsel for ANNE-MARIE COLE suitable proof to document the compliance of KEVIN JOHN CAIN with the Order of this Court relative to the requirement imposed by this Court that KEVIN JOHN CAIN obtain a psychiatric evaluation and treatment I the office of Dr. Patrick Sewell. Until such time as KEVIN JOHN CAIN has met the requirements imposed herein, the visitation otherwise afforded to KEVIN JOHN CAIN in the Judgment rendered in these proceeding on September 21, 2004 shall be suspended.

IT IS FUTHER ORDERED, ADJUDGED AND DECREED that KEVIN JOHN CAIN shall not direct any further communication, including, but certainly not limited to telephone communication, voice messages, or written communication of any nature whatsoever, to the office or home of Judge Robert P Waddell as has been done by KEVIN JOHN CAIN subsequent to the bench ruling of Judge Robert P. Waddell on September 21,2004.

IT IS FURTHER ORDERED, ADJUDGED AND DECREEED that counsel for KEVIN JOHN CAIN shall immediately communicate the contents of this Order to KEVIN JOHN CAIN so that there will be no further communication directed by KEVIN JOHN CAIN to the Court in contravention of the Order imposed herein prohibiting such communication.

JUDGEMMENT RENDERED October 1, 2004; read signed and filed on the 5th day of October 2004 Shreveport, Caddo Parish, Louisiana.

s/ ROBERT P. WADDELL,
District Judge

Judgment rendered May 11, 2005.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 39,903-CA
COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

ANNE MARIE COLE CAIN
Plaintiff-Appellee

Versus

KEVIN JOHN CAIN
Defendant-Appellant

* * * * *

Appealed from the First Judicial District Court for the Parish of Caddo, Louisiana Trial Court No. 417,793 Honorable Robert P. Waddell, Judge

* * * * *

CHARLES H. KAMMER, III
Counsel for Appellant

KEVIN JOHN CAIN
Pro Se

GARY A. BOWERS
Counsel for Appellee

* * * * *

Before GASKINS, CARAWAY and MOORE, JJ.

MOORE, J.

Kevin Cain appeals a judgment awarding sole custody of his two sons, Adam and Jacob, to their mother, Anne-Marie Cole, subject to limited visitation. Appearing pro se, Kevin chiefly contests the report and testimony of a court-appointed mental health panel which found he suffered from severe mental illness and recommended limited, supervised visitation until he completed evaluation and therapy with a mental health provider. For the reasons expressed, we affirm.

Factual Background

Kevin and Anne-Marie were married in December 1986. Adam was born in February 1991, Jacob in March 1994.

In March 1995, Kevin was voluntarily admitted to Charter Forest, a mental health facility, for erratic conduct, major depression and suicidal thoughts. After three days, Kevin tried to discharge himself from Charter Forest; Dr. Lee Stevens and Dr. Kevin Brown issued certificates to have him involuntarily confined because he was suicidal and gravely disabled. Dr. Stevens diagnosed a bipolar condition and personality disorders; according to Charter Forest's records, Kevin told Dr. Thomas Staats that he had been "self-medicating himself for stress with marijuana," and he admitted to Dr. Stevens that he had been using Mini Thins, marijuana and crystal methamphetamine. In late March, Kevin was discharged; Dr. Stevens "deferred" making a discharge diagnosis, but prescribed an antidepressant and recommended further medical treatment.

Roughly two months after he left Charter Forest, Kevin joined the U.S. Army, spending most of the next four years out of state.

Anne-Marie filed a petition for divorce in September 1996. The judgment of divorce awarded joint custody and designated Anne-Marie the domiciliary parent, but did not enter a plan of implementation; at the time, Kevin was still out of state in the service. He testified, however, that he phoned the boys every night during this period. He was honorably

discharged in October 1999, returned to Louisiana and moved in with his mother in western Caddo Parish.

According to Anne-Marie, on his return Kevin "demanded" to have the boys every weekend, harassing her and the boys with phone calls, uninvited personal visits to her house in Broadmoor, shouting, cursing, and making death threats. She testified that Kevin's conduct turned suddenly worse after she remarried in October 2002. On January 7, 2003, she filed a rule to implement a plan of joint custody and for injunctive relief. She alleged that his "escalating pattern of abusive behavior" was a change of circumstances. She described seven incidents between June and November 2002. On one occasion, he told her she would be "dead before the day was over" because she took one of the boys directly to ball practice instead of to Kevin's house first. On another, he returned the boys from visitation 2½ hours early, only to find Anne-Marie not yet home; later, he came back, pounded on her back door, cursed and threatened her in front of one of the boys; rang her doorbell repeatedly until she threatened to call the police; parked nearby to observe her actions; and barraged her with phone calls.

At a hearing on the rule, Kevin's counsel requested mental health evaluations under La. R.S. 9:331. The district court entered a judgment and interim order on February 19, 2003. The judge appointed a psychologist, Dr. Susan Vigen, to evaluate the children, and a psychiatrist, Dr. Richard Williams, to evaluate Kevin and Anne-Marie; issued a TRO enjoining both parties from harassing or threatening one another; and granted Kevin visitation from Friday night to Sunday afternoon two out of every three weekends, pending the mental health evaluation. Kevin testified that the interim scheme worked smoothly, except that Anne-Marie resented getting less weekend time than he did; Anne-Marie, however, related an unchanged pattern of friction and harassment.

In June 2003, the mental health panel (joined by another psychologist, Dr. Mark Vigen) filed its report, a very negative assessment of Kevin. The panel strongly criticized him for

failing to disclose his prior CDS use and psychiatric treatment; Dr. Williams was especially concerned that Kevin suppressed these facts when he enlisted in the Army. The report labeled him "rigid, defensive, and deceptive"; diagnosed an untreated bipolar disorder and narcissistic and paranoid personality disorder; predicted that without medication, he would have "severe difficulties in communication" with Anne-Marie; and found "it is not safe for him to have unsupervised visitation with the children." The panel recommended one day of visitation every other weekend "in a supervised setting" and that Kevin should obtain psychiatric treatment with quarterly reports to the panel.

On July 25, 2003, Anne-Marie filed the instant motion to amend her petition, seeking sole custody and restricting Kevin to the supervised visitation set forth in the mental health panel's report. After a hearing, the district court issued an amended interim order dated August 29, adopting the panel's recommendations.

The parties admit that from the date of the amended order until trial in September 2004, Kevin never once exercised supervised visitation, instead seeing the boys for roughly one hour each week by attending their Sunday church service at Broadmoor Presbyterian. Kevin testified that he discussed the matter with the boys, and they did not want to visit within sight and sound of a supervisor. However, during in camera examination by the court, one of the boys testified that his dad disliked supervised visitation and told them so.

Also after the amended order, Kevin returned to Dr. Stevens's office for the first time in eight years. Kevin testified that his Charter Forest records from March 1995 were "erroneous" in that he had never told anyone he was using CDS or contemplating suicide. Dr. Stevens related that Kevin appeared without an appointment and wanted him to delete portions of the Charter Forest record, or else he would file ethical complaints with various medical agencies. Dr. Stevens

refused to alter the records. Kevin lodged complaints against him with six agencies; all were dismissed.[1]

In September 2003, Kevin contacted Dr. Gerald Baker, a clinical psychologist. Dr. Baker administered an MMPI; test results indicated no psychopathology or anything to say he is unsuitable for parenting. He noted, however, that Kevin "places himself in an overly positive light by minimizing faults and denying psychological problems." He admitted, however, that Kevin never showed him Anne-Marie's petition or her allegations of death threats and harassment, never disclosed the fact that he had threatened Dr. Stevens, and denied ever using CDS. Dr. Baker also testified it was unusual for a parent to forgo all visitation just because it was supervised.

In late October 2003, Kevin hired a forensic psychiatrist, Dr. Alberto Goldwaser of Paramus, New Jersey. He performed a "psychiatric-legal examination," finding no mental disorder that poses any risk to Kevin's children. He disagreed with the Charter Forest assessment on grounds that bipolar condition cannot "clear up" without medical attention; he felt the reason for Kevin's 1995 confinement was "substance-induced mood disorder," as Kevin admitted the occasional use of methamphetamine to aid his breathing. Because there were no "significant problems during the 3½ years of uninterrupted and unsupervised time-sharing," he felt this validated Kevin's parental fitness. He admitted, however, that Kevin did not disclose Anne-Marie's allegations of threats and harassment; that he had threatened Dr. Stevens; or even the contents of Kevin's deposition.

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[1]The agencies included the Louisiana State Board of Medical Examiners, Louisiana State 1 Medical Society, American Psychiatric Association, American Society of Addiction Medicine, American Medical Association, and Louisiana Psychiatric Association. Kevin also filed an ethics complaint against Dr. Williams with the Louisiana State Board of Medical Examiners; this too was dismissed.

Trial Testimony

The matter was tried over four days in September 2004. Anne-Marie elaborated on the incidents described in her rule; while he had visitation two of every three weekends, Kevin would never adjust it to accommodate her schedule, but he took great liberty in returning the boys early or late without advance notice. Virtually every custody exchange provoked Kevin into a rage, with loud profanities and death threats; she estimated he threatened her 25–50 times. Anne-Marie's father, Jeff Cole, corroborated several incidents, as when Kevin tailgated them home after a Dixie League baseball game in Monroe, blocked her egress after they left the boys for visitation, and cursed and profaned her on many occasions. Dr. Williams, who headed the mental health panel, testified that Kevin was a danger to his children because of his chronic dishonesty; "his only regard is what he thinks is right." Dr. Williams recommended Dr. Patrick Sewell to evaluate Kevin, prescribe any necessary medication, and make quarterly reports to the court. The boys testified in camera, out of the presence of the parties or their attorneys, that their dad had never hurt or neglected them, but he had a bad temper, hollered and cursed at their mom, and was seldom willing to do what they wanted on visitation. They especially disliked when Kevin made them sit in the house and read medical textbooks.

Kevin testified that visitation under the previous plans had worked smoothly. He denied Anne-Marie's claim that he threatened to kill her at least 25 times; he discounted her other allegations, such as the tailgating incident, as grossly exaggerated. He maintained that he checked into Charter Forest only because Anne-Marie and her domineering father had pressured him; he told the doctors about his CDS use and suicidal thoughts only because it was "what they wanted to hear," although in point of fact he never did drugs or contemplated suicide. He testified that he hired Dr. Goldwaser, and visited Dr. Stevens's office in 2003, only to clear up "errors" in his Charter Forest record. He offered Dr.

Goldwaser's and Dr. Baker's depositions into evidence. He also called his mother and two family friends to testify they had never seen Kevin act inappropriately with his sons.

Action of the District Court

The district court rendered oral reasons, finding that both parents loved their children but the complete breakdown of communication between the parties made joint custody impossible. The court found the boys were scared of their father and did not want visitation every weekend. It further noted that while Anne-Marie had remarried and "gone on with her life," Kevin did not have an "open door relationship" with the boys. The court awarded sole custody to Anne-Marie, with Kevin to exercise unsupervised visitation from 10 am to 6 pm every other Saturday, pending further orders of the court. The court also ordered Kevin to make an appointment with Dr. Sewell, and submit to any testing or treatment he might offer. Finally, the judgment gave detailed instructions regarding the exchange of custody on visitation days, the exchange of information between the parties, and other matters not specifically challenged on appeal.

Kevin has appealed, urging by pro se brief eight assignments of error, which we have grouped according to subject matter.

Award of Sole Custody

By three assignments of error, Kevin contests the award of sole custody to Anne-Marie. By his first assignment, he contends that Anne-Marie failed to prove a change of circumstances materially affecting the children's welfare since the original decree, and that the proposed modification is in their best interest. Matherne v. Matherne, 562 So. 2d 937 (La. App. 5 Cir. 1990) [2] He contends that she offered no proof of her allegations of harassment or that Kevin was unfit or a harm to the children, and thus failed to meet her burden. By his fifth assignment, he argues the trial court erred in failing to

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[2]Because the prior decree was by consent, she did not have to satisfy the "heavy" burden 2 of Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986).

consider Anne-Marie's moral character insofar as it affects the children's welfare. Specifically, he contends that in a request for admissions, she denied ever smoking marijuana, but his own "discovery witness list provided two witnesses who could testify to the fact that she consumed illegal drugs during pregnancy with both children." By his eighth assignment, he urges the court failed to consider the "evidence as a whole" in determining the best interest of the children. In support, he cites the factors for determining a child's best interest, La. C.C. art. 134; he quotes passages from the mental health panel's report, and from Dr. Goldwaser's deposition, which would support seven of the 12 factors. He also refers to a report by Dr. Anita Kablinger, a psychiatrist at LSU Health Sciences Center. In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child. La. C.C. art. 131; AEB v. JBE, 99-2668 (La. 11/30/99), 752 So. 2d 756. The court shall consider all relevant factors in determining the best interest of the child. La. C.C. art. 134. [3]

[3]The court shall consider all relevant factors in determining the best interest of the child. 3 Such factors may include (1) The love, affection, and other emotional ties between each party and the child. (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child. (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs. (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment. (5) The permanence, as a family unit, of the existing or proposed custodial home or homes. (6) The moral fitness of each party, insofar as it affects the welfare of the child. (7) The mental and physical health of each party. (8) The home, school, and community history of the child. (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference. (10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party. (11) The distance between the respective residences of the parties. (12) The responsibility for the care and rearing of the child previously exercised by each party.

The factors are provided as a guide to the court; the relative weight assigned to each is within the court's discretion. Flanagan v. Flanagan, 36,852 (La. App. 2 Cir. 3/5/03), 839 So. 2d 1070. If custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent. La. C.C. art. 132; Evans v. Lungrin, 97-0541 (La. 2/6/98), 708 So. 2d 731.

When the original decree is a stipulated judgment, the party seeking to modify a custody plan must prove that there has been a change in circumstances materially affecting the welfare of the child since the original decree and that the proposed modification is in the best interest of the child. Evans v. Lungrin, supra; Flanagan v. Flanagan, supra. The determination of the trial court in custody matters is entitled to great weight; this discretion will not be disturbed on review in the absence of a clear showing of abuse. AEB v. JBE, supra; Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986); Blackshire v. Washington, 39,028 (La. App. 2 Cir. 8/18/04), 880 So. 2d 988. The trial court's great discretion is premised on its superior position to see and hear the witnesses and evaluate their sincerity and credibility. For this reason, the appellate court adopts the lower court's findings as its own in the absence of clear error, even if other conclusions from the same testimony might seem equally reasonable. Blackshire v.Washington, supra. There is no merit to Kevin's contention that Anne-Marie "offered no proof of her allegations of harassment by the Father or that the Father was unfit or a harm to the children." Anne-Marie graphically described a pattern of harassment and threats; her father and the children corroborated much of her testimony, which this court has already outlined and will not belabor. The mental health panel found bipolar disorder and other serious problems; Drs. Williams and Vigen also testified, and were uncommonly frank in depicting the risk of extended or unsupervised visitation. Against this evidence, the district court considered Kevin's testimony, selected passages of the panel's report (taken in isolation, these presented a less critical view of

Kevin), and the reports of Drs. Baker and Goldwaser. On this wide divergence of evidence, we cannot say the district court abused its great discretion. Blackshire v. Washington, supra. There is also no basis to reconsider or revisit the best interest factors of La. C.C. art. 134. The district court plainly acknowledged both parties' love, affection and capacity to provide for the children. While there was testimony that both Anne-Marie and Kevin may have smoked marijuana together early in their marriage, no one established that she did so after early 1995. The mental health panel's conclusions, together with the history of friction in the exchange of custody, weigh heavily in favor of the district court's judgment. We perceive no abuse of discretion. Flanagan v. Flanagan, supra.

The record evidence, taken as a whole, supports the district court's finding of a change in circumstances since the 1996 consent judgment of joint custody and that awarding sole custody to Anne-Marie is in the children's best interest. These assignments of error lack merit.

Expert Testimony

By three assignments of error, Kevin urges that the district court should have assigned more weight to his experts, Drs. Goldwaser and Baker, and less to the court-appointed mental health panel. By his second

assignment, he contends the district court "unjustifiably disregarded the facts and evidence presented by medical experts that validly substantiated" his own fitness as a parent. By his seventh assignment, he urges the court erred in not considering his claim that the 1995 Charter Forest admission was invalid and incorrect, given the evidence of Dr. Stevens's "character as a witness and competence as an M.D." By his sixth assignment, he argues the court erred in considering the Charter Forest record as evidence that he is unfit, while otherwise limiting the trial events that occurred after 1997. He contends that the Charter Forest record was simply irrelevant. In support he cites La. C.E. arts. 401, 403.

Anne-Marie responds that Kevin withheld critical information from Drs. Goldwaser and Baker, casting doubt on

their opinions and warranting the court's refusal to credit them. She also urges the Charter Forest records were admissible to impeach Kevin's testimony that he never used CDS or was suicidal. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. La. C.E. art. 702.

The principle that questions of credibility are for the trier of fact to resolve applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. Bonnette v. Conoco Inc., 2001-2767 (La. 1/28/03), 837 So. 2d 1219. After weighing and evaluating expert and lay testimony, the district court may accept or reject the opinion expressed by any expert. The weight given to expert testimony depends on the professional qualifications and experience of the expert and the facts upon which the opinion is based. Jones v. Jones, 38,790 (La. App. 2 Cir. 6/25/04), 877 So. 2d 1061; Verret v. Verret, 34,982 (La. App. 2 Cir. 5/9/01), 786 So. 2d 944.

Simply put, Kevin withheld many facts from Drs. Goldwaser and Baker, upon whose reports he chiefly relies. Dr. Goldwaser's glowing assessment was based in part on a history, provided by Kevin, that he had exercised visitation for 3½ years with no significant problems; Kevin never disclosed the serious allegations of harassment and death threats which we find it unnecessary to reiterate. Dr. Goldwaser testified that during their interview, Kevin admitted using marijuana prior to his Charter Forest admission (hence the diagnosis of substance-induced mood disorder), yet at trial Kevin denied ever discussing CDS with him. Dr. Goldwaser was also unaware that Kevin had badgered Dr. Stevens to excise portions of the Charter Forest record; he admitted this was highly unusual. Kevin's omissions to Dr. Baker were similar. By contrast, Dr. Goldwaser was aware that Kevin's trial attorney had expressed the need for "expert psychiatric witnesses who can testify that they have evaluated you and

that they disagree with the conclusions reached by Dr. Williams." This sort of guidance may have informed the witness's ultimate opinion, as well as the district court's view of that opinion.

On this record, the district court was completely within its discretion to discount the opinions of Kevin's experts and to accept the conclusions of the court-appointed mental health panel.

Finally, Kevin correctly shows that the district court ruled in limine that evidence of conduct predating the joint custody consent decree would be inadmissible. Ordinarily, such evidence is not relevant to the burden of proving a change of circumstances. However, a party may examine a witness concerning any matter having a reasonable tendency to disprove the truthfulness or accuracy of his testimony. La. C.E. art. 607 C. Evidence that is otherwise irrelevant may be admissible to impeach a witness. Francois v. Norfolk Southern Corp., 2001-1954 (La. App. 4 Cir. 3/6/02), 812 So. 2d 804. The decision to admit impeachment evidence falls within the discretion of the district court. State v. Tauzin, 38,436 (La. App. 2 Cir. 8/18/04), 880 So. 2d 157. Because credibility was crucial to this highly contentious case, the district court did not abuse its discretion in considering the Charter Forest records for their impeachment value. This assignment lacks merit.

Other Issues

By his third assignment, Kevin urges the district court committed legal error in awarding sole custody to Anne-Marie, who had prayed for nothing more than a joint custody implementation plan. However, Anne-Marie clearly prayed for sole custody by her motion to supplement and amend her petition on July 25, 2003. This assignment lacks merit. By his fourth assignment, Kevin urges the court erred in appointing another evaluator in the final judgment of October 5, 2004, after it received notice, at a pre-judgment hearing on October 1, 2004, that Dr. Sewell refused to act. At the October 1 hearing, trial counsel advised the court that Dr. Sewell was

out of the country and at any rate no longer handles "legal cases." The court then named Dr. Clif Dopson in his stead, but gave counsel until the following Monday, October 4, to nominate any other psychiatrist. The record does not show that Kevin or his counsel followed up on this. Kevin now contends that the court should have accepted the report of his own psychiatrist, Dr. Anita Kablinger.

The record does not show that Kevin submitted her name as a substitute for Dr. Dopson or filed a motion to admit her report in evidence. This issue was never presented to the district court; the court will not consider any issue raised for the first time on appeal. Segura v. Frank, 93-1271 (La. 1/14/94), 630 So. 2d 714; Cason v. Cason, 38,974 (La. App. 2 Cir. 10/27/04), 886 So. 2d 628. This assignment presents nothing to review.

By this opinion, Kevin is advised that judgments awarding custody and child support are never truly final. Hansel v. Hansel, 2000-1914 (La. App. 4 Cir. 11/21/01), 802 So. 2d 875, writ denied, 2001-3365 (La. 3/8/02), 811 So. 2d 880; Davis v. Davis, 238 La. 293, 115 So. 2d 293 (1959). The instant judgment is expressly subject to modification if Kevin will be evaluated by, cooperate with and consent to treatment from Dr. Sewell. Submitting to evaluation and treatment is critical to expanding Kevin's limited visitation. If Dr. Sewell is truly unavailable, appropriate action should be taken in the trial court to appoint a substitute.

Conclusion

For the reasons expressed, the judgment is affirmed. Costs are charged to the appellant, Kevin John Cain.

AFFIRMED.

"Writ denied"

Action rendered June 15, 2005 by the Louisiana Supreme Court

No. 2005-C-1517

SUPREME COURT OF LOUISIANA

* * * * *

KEVIN JOHN CAIN
Defendant-Appellant

Versus

ANNE MARIE COLE CAIN
Plaintiff-Appellee

* * * * *

On Petition for a Writ of Certiorari to the Louisiana Second Circuit Court of Appeal

Honorable Gaskins, Moore, Carraway

PETITION FOR WRIT OF CERTIORARI